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Please re-focus the search along the lines of the payee and the clearinghouse or check payment system. We want to look for payees submitting or presenting checks directly into the payment system or to a clearinghouse for settlement (i.e. avoiding the depository bank or bank of first deposit), without regard to such as the word endorsement, but with the payees account at the depository bank still being credited.

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Terry L. Geer

check
cheque
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financial instrument

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on @ 12:45 pm

seven days after establishment of the individual retirement account pursuant to 26 CFR 1.408-6(d)(4), where it is maintained in a Keogh (H.R. 10) plan, or where it is maintained in a '401(k) plan' under 26 U.S.C. 401(k); Provided that the depositor forfeits an amount at least equal to the simple interest earned on the amount withdrawn;

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(b) Where the depository institution pays all or a portion of a time deposit representing funds contributed to an individual retirement account or a Keogh (H.R.10) plan established pursuant to 26 U.S.C. 408 or 26 U.S.C. 401 or to a '401(k) plan' established pursuant to 26 U.S.C. 401(k) when the individual for whose benefit the account is maintained attains age 59 1/2 or is disabled (as defined in 26 U.S.C. 72(m)(7)) or thereafter;

(c) Where the depository institution pays that portion of a time deposit on which federal deposit insurance has been lost as a result of the merger of two or more federally insured banks in which the depositor previously maintained separate time deposits, for a period of one year from the date of the merger;

(d) Upon the death of any owner of the time deposit funds;

(e) When any owner of the time deposit is determined to be legally incompetent by a court or other administrative body of competent jurisdiction; or

(f) Where a time deposit is withdrawn within ten days after a specified maturity date even though the deposit contract provided for automatic renewal at the maturity date.

2 A nonpersonal time deposit with a stated maturity of one and one-half years or more may be treated as having an original maturity of one and one-half years or more only if it is subject to the minimum penalty described in paragraph (f)(3) of this section.

(A) Payable on a specified date not less than seven days after the date of deposit;
(B) Payable at the expiration of a specified time not less than seven days after the date of deposit;
(C) Payable only upon written notice that is actually required to be given by the depositor not less than seven days prior to withdrawal;
(D) Held in 'club' accounts (such as 'Christmas club' accounts and 'vacation club' accounts that are not maintained as 'savings deposits') that are deposited under written contracts providing that no withdrawal shall be made until a certain number of periodic deposits have been made during a period of not less than three months even though some of the deposits may be made within six days from the end of the period; or
(E) Share certificates and certificates of indebtedness issued by credit unions, and certificate accounts and notice accounts issued by savings and loan associations;
(ii) A 'savings deposit;'
(iii) An 'IBF time deposit' meeting the requirements of Sec. 204.8(a)(2); and
(iv) Borrowings, regardless of maturity, represented by a promissory note, an

acknowledgment of advance, or similar obligation described in Sec. 204.2(a)(1)(vii) that is issued to, or any bankers' acceptance (other than the type described in 12 U.S.C. 372) of the depository institution held by--

(A) Any office located outside the United States of another depository institution or Edge or agreement corporation organized under the laws of the United States;

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(B) Any office located outside the United States of a foreign bank;

(C) A foreign national government, or an agency or instrumentality thereof,3 engaged principally in activities which are ordinarily performed in the United States by governmental entities;

3 Other than states, provinces, municipalities, or other regional or local governmental units or agencies or instrumentalities thereof.

(D) An international entity of which the United States is a member; or

(E) Any other foreign, international, or supranational entity specifically designated by the Board.4

4 The designated entities are specified in 12 CFR 204.125.

(2) A time deposit may be represented by a transferable or nontransferable, or a negotiable or nonnegotiable, certificate, instrument, passbook, or statement, or by book entry or otherwise.

(d)(1) 'Savings deposit' means a deposit or account with respect to which the depositor is not required by the deposit contract but may at any time be required by the depository institution to give written notice of an intended withdrawal not less than seven days before withdrawal is made, and that is not payable on a specified date or at the expiration of a specified time after the date of deposit. The term 'savings deposit' includes a regular share account at a credit union and a regular account at a savings and loan association.

(2) The term savings deposit also means: A deposit or account, such as an account commonly known as a passbook savings account, a statement savings account, or as a money market deposit account ('MMDA'), that otherwise meets the requirements of Sec. 204.2(d)(1) and from which, under the terms of the deposit contract or by practice of the depository institution, the depositor is permitted or authorized to make no more than six transfers and withdrawals, or a combination of such transfers and withdrawals, per calendar month or statement cycle (or similar period) of at least four weeks, to another account (including a transaction account) of the depositor at the same institution or to a third party by means of a preauthorized or automatic transfer, or telephonic (including data transmission) agreement, order or instruction, and no more than three of the six such transfers may be made by **check,** draft, debit card, or similar order made by the depositor and payable to third parties. A 'preauthorized transfer' includes any arrangement by the depository institution to pay a third party from the account of a depositor upon written or oral instruction (including an order received through an automated **clearing** house (ACH)) or any arrangement by a depository institution to pay a third party from the account of the depositor at a predetermined time or on a fixed schedule. Such an account is not a 'transaction account' by virtue of an arrangement that permits transfers for the purpose of repaying loans and associated expenses at the same depository institution (as originator or servicer) or that permits transfers of funds from this account to another account of the same depositor at

the same institution or permits withdrawals (payments directly to the depositor) from the account when such transfers or withdrawals are made by mail, messenger, automated teller machine, or in person or when such withdrawals are made by telephone (via **check** mailed to the depositor) regardless of the number of such transfers or withdrawals. 5, 6

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5 In order to ensure that no more than the permitted number of withdrawals or transfers are made, for an account to come within the definition in paragraph (d)(2) of this section, a depository institution must either:

(a) prevent withdrawals or transfers of funds from this account that are in excess of the limits established by paragraph (d)(2) of this section, or

(b) adopt procedures to monitor those transfers on an ex post basis and contact customers who exceed the established limits on more than an occasional basis.

For customers who continue to violate those limits after they have been contacted by the depository institution, the depository institution must either close the account and place the funds in another account that the depositor is eligible to maintain, or take away the transfer and draft capacities of the account.

An account that authorizes withdrawals or transfers in excess of the permitted number is a transaction account regardless of whether the authorized number of transactions are actually made. For accounts described in paragraph (d)(2) of this section, the institution at its option may use, on a consistent basis, either the date on the check, draft, or similar item, or the date the item is paid in applying the limits imposed by that section.

6 [Reserved]

(3) A deposit may continue to be classified as a savings deposit even if the depository institution exercises its right to require notice of withdrawal.

(4) 'Savings deposit' does not include funds deposited to the credit of the depository institution's own trust department where the funds involved are utilized to cover checks or drafts. Such funds are 'transaction accounts.'

(e) 'Transaction account' means a deposit or account from which the depositor or account holder is permitted to make transfers or withdrawals by negotiable or transferable instrument, payment order of withdrawal, telephone transfer, or other similar device for the purpose of making payments or transfers to third persons or others or from which the depositor may make third party payments at an automated teller machine ('ATM') or a remote service unit, or other electronic device, including by debit card, but the term does not include savings deposits or accounts described in paragraph (d)(2) of this section even though such accounts permit third party transfers. 'Transaction account' includes:

(1) Demand deposits;

(2) Deposits or accounts on which the depository institution has reserved the right to require at least seven days' written notice prior to withdrawal or transfer of any funds in the account and that are subject to check, draft,

negotiable order of withdrawal, share draft, or other similar item, except accounts described in paragraph (d)(2) of this section (savings deposits), but including accounts authorized by 12 U.S.C. 1832(a) (NOW accounts).

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(3) Deposits or accounts on which the depository institution has reserved the right to require at least seven days' written notice prior to withdrawal or transfer of any funds in the account and from which withdrawals may be made automatically through payment to the depository institution itself or through transfer or credit to a demand deposit or other account in order to cover checks or drafts drawn upon the institution or to maintain a specified balance in, or to make periodic transfers to such accounts, except accounts described in paragraph (d)(2) of this section, but including accounts authorized by 12 U.S.C. 371a (automatic transfer accounts or ATS accounts).

(4) Deposits or accounts on which the depository institution has reserved the right to require at least seven days' written notice prior to withdrawal or transfer of any funds in the account and under the terms of which, or by practice of the depository institution, the depositor is permitted or authorized to make more than six withdrawals per month or statement cycle (or similar period) of at least four weeks for the purposes of transferring funds to another account of the depositor at the same institution (including 'transaction account') or for making payment to a third party by means of a preauthorized transfer, or telephonic (including data transmission) agreement, order or instruction, except accounts described in paragraph (d)(2) of this section. An account that authorizes more than six such withdrawals in a calendar month, or statement cycle (or similar period) of at least four weeks, is a 'transaction account' whether or not more than six such transfers are made during such period. A 'preauthorized transfer' includes any arrangement by the depository institution to pay a third party from the account of a depositor upon written or oral instruction (including an order received through an automated **clearing** house (ACH)), or any arrangement by a depository institution to pay a third party from the account of the depositor at a predetermined time or on a fixed schedule. Such an account is not a 'transaction account' by virtue of an arrangement that permits transfers for the purpose of repaying loans and associated expenses at the same depository institution (as originator or servicer) or that permits transfers of funds from this account to another account of the same depositor at the same institution or permits withdrawals (payments directly to the depositor) from the account when such transfers or withdrawals are made by mail, messenger, automated teller machine or in person or when such withdrawals are made by telephone (via **check** mailed to the depositor) regardless of the number of such transfers or withdrawals.

(5) Deposits or accounts maintained in connection with an arrangement that permits the depositor to obtain credit directly or indirectly through the drawing of a negotiable or nonnegotiable check, draft, order or instruction or other similar device (including telephone or electronic order or instruction) on the issuing institution that can be used for the purpose of making payments or transfers to third persons or others or to a deposit account of the depositor.

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(6) All deposits other than time and savings accounts, including those accounts that are time and savings deposits in form but that the Board has determined, by rule or order, to be transaction accounts.

(f)(1) 'Nonpersonal time deposit' means:

(i) A time deposit, including an MMDA or any other savings deposit, representing funds in which any beneficial interest is held by a depositor which is not a natural person;

(ii) A time deposit, including an MMDA or any other savings deposit, that represents funds deposited to the credit of a depositor that is not a natural person, other than a deposit to the credit of a trustee or other fiduciary if the entire beneficial interest in the deposit is held by one or more natural persons;

(iii) A time deposit that is transferable, except a time deposit originally issued before October 1, 1980, to and held by one or more natural persons, including a deposit to the credit of a trustee or other fiduciary if the entire beneficial interest in the deposit is held by one or more natural persons;

(iv) A time deposit that is transferable, issued on or after October 1, 1980, to and held by one or more natural persons, including a deposit to the credit of a trustee or other fiduciary if the entire beneficial interest is held by one or more natural persons. A time deposit is transferable unless it contains a specific statement on the certificate, instrument, passbook, statement or other form representing the account that it is not transferable. A time deposit that contains a specific statement that it is not transferable is not regarded as transferable even if the following transactions can be effected: a pledge as collateral for a loan; a transaction that occurs due to circumstances arising from death, incompetency, marriage, divorce, attachment or otherwise by operation of law or a transfer on the books or records of the institution; and

(v) A time deposit represented by a promissory note, an acknowledgment of advance, or similar obligation described in paragraph (a)(1)(vii) of this section that is issued to, or any bankers' acceptance (other than the type described in 12 U.S.C. 372) of the depository institution held by:

(A) Any office located outside the United States of another depository institution or Edge or agreement corporation organized under the laws of the United States;

(B) Any office located outside the United States of a foreign bank;

(C) A foreign national government, or an agency or instrumentality thereof,7 engaged principally in activities which are ordinarily performed in the United States by governmental entities;

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7 Other than states, provinces, municipalities, or other regional or local governmental units or agencies or instrumentalities thereof.

(D) An international entity of which the United States is a member; or

(E) Any other foreign, international, or supranational entity specifically designated by the Board.8

8 The designated entities are specified in 12 CFR 217.126.

(2) Nonpersonal time deposit does not include nontransferable time deposits to the credit of or in which the entire beneficial interest is held by an individual pursuant to an individual retirement account or Keogh (H.R. 10) plan under 26 U.S.C. 408, 401, or non-transferable time deposits held by an employer as part of an unfunded deferred-compensation plan established pursuant to subtitle D of the Revenue Act of 1978 (Pub. L. 95-600, 92 Stat. 2763), or a '401(k) plan' under 26 U.S.C. 401(k).

(3) Any nonpersonal time deposit with a stated maturity or notice period of one and one-half years or more that permits any early withdrawal must be subject to a minimum early withdrawal penalty equal to at least thirty days' simple interest on the amount withdrawn for any withdrawal that occurs more than six

guaranteed by, public-sector entities in OECD countries, below the level of central government.

10. Claims on or guaranteed by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.

11. Portions of loans and other assets collateralized with securities issued by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.

12. That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the bank has local currency liabilities in that country.

Category 3: 50 Percent

1. Revenue bonds or similar obligations, including loans and leases, that are obligations of public sector entities in OECD countries, but for which the government entity is committed to repay the debt only out of revenues from the facilities financed.

2. Credit equivalent amounts of interest rate and exchange rate related contracts, except for those assigned to a lower risk category.

3. Assets secured by a first mortgage on a one-to-four family residential property that are not more than 90 days past due, on nonaccrual or restructured.

4. Loans to residential real estate builders for one-to-four family residential property construction that have been presold pursuant to legally binding written sales contract.

5. Assets secured by a first mortgage on multifamily residential properties.

Category 4: 100 Percent

1. All other claims on private obligors.

2. Claims on non-OECD financial institutions with a residual maturity exceeding one year. Claims on non-OECD central banks with a residual maturity exceeding one year are included in this category unless they qualify for item 4 of Category 1.

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3. Claims on non-OECD central governments that are not included in item 4 of Category 1.

4. Obligations issued by state or local governments (including industrial development authorities and similar entities) repayable solely by a private party or enterprise.

5. Premises, plant, and equipment; other fixed assets; and other real estate owned.

6. Investments in unconsolidated subsidiaries, joint ventures, or associated companies (unless deducted from capital).

7. Capital instruments issued by other banking organizations.

8. All other assets (including claims on commercial firms owned by the public sector).

Table 2--Credit Conversion Factors for Off-Balance Sheet Items

100 Percent Conversion Factor

1. Direct credit substitutes (general guarantees of indebtedness and

guarantee-type instruments, including standby letters of credit serving as financial guarantees for, or supporting, loans and securities).

2. Risk participations in bankers acceptances and participations in direct credit substitutes (e.g., standby letters of credit).

3. Sale and repurchase agreements and asset sales with recourse, if not already included on the balance sheet.

4. Forward agreements (i.e., contractual obligations) to purchase assets, including financing facilities with certain drawdown.

50 Percent Conversion Factor

1. Transaction-related contingencies (e.g., bid bonds, performance bonds, warranties, and standby letters of credit related to particular transactions).

2. Unused portion of commitments with an original maturity exceeding one year.

3. Revolving underwriting facilities (RUFs), note issuance facilities (NIFs) and other similar arrangements.

20 Percent Conversion Factor

1. Short-term, self-liquidating trade-related contingencies, including commercial letters of credit.

Zero Percent Conversion Factor

1. Unused portion of commitments with an original maturity of one year or less.

2. Unused portion of commitments which are unconditionally cancelable at any time, regardless of maturity.

Table 3--Treatment of Derivative Contracts

1. The current exposure method is used to calculate the credit equivalent amounts of derivative contracts. These amounts are assigned a risk weight appropriate to the obligor or any collateral or guarantee. However, the maximum risk weight is limited to 50 percent. Multiple derivative contracts with a single counterparty may be netted if those contracts are subject to a qualifying bilateral netting contract.

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Conversion Factor Matrix [FN1]
[Percent]

Remaining maturity [FN2]	Interest rate	Foreign exchange rate and gold	Equity [FN2]	Precious metals	Other commodity
One year or less	0.0	1.0	6.0	7.0	10.0
Over one to five years	0.5	5.0	8.0	7.0	12.0
Over five years	1.5	7.5	10.0	8.0	15.0

FN1 For derivative contracts with multiple exchanges of principal, the

conversion factors are multiplied by the number of remaining payments in the derivative contract.

FN2 For derivative contracts that automatically reset to zero value following a payment, the remaining maturity equals the time until the next payment. However, interest rate contracts with remaining maturities of greater than one year shall be subject to a minimum conversion factor of 0.5 percent.

2. The following derivative contracts will be excluded:

a. Exchange rate contract with an original maturity of 14 calendar days or less; and

b. Derivative contract traded on exchanges and subject to daily margin requirements.

Table 4--Definition of Capital

Capital components are distributed between two categories (Tier 1 and Tier 2). Tier 2 capital elements will qualify as part of a bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital. Beginning December 31, 1992, the minimum risk-based capital standard will be 8.0%.

Definition of Capital

Tier 1:

. Common stockholders' equity;

. Noncumulative perpetual preferred stock and any related surplus; and

. Minority interests in the equity accounts of consolidated subsidiaries.

Tier 2:

. Cumulative perpetual, long-term and convertible preferred stock, and any related surplus; 5

5 The amount of long-term and intermediate-term preferred stock, as well as term subordinated debt that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of the instrument at the beginning of each of the last five years of the life of the instrument.

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. Perpetual debt and other hybrid debt/equity instruments;

. Intermediate-term preferred stock and term subordinated debt (to a maximum of 50% of Tier 1 capital); and

. Loan loss reserves (to a maximum of 1.25% of risk-weighted assets).

Deductions from Capital:

From Tier 1:

. Goodwill and other intangibles, with the exception of identified intangibles that satisfy the criteria included in the guidelines.

From Total Capital:

. Investments in unconsolidated banking and finance subsidiaries;

. Reciprocal holdings of capital instruments

Transitional Definition

During a transition period beginning December 31, 1990, all national banks are expected to maintain a capital to risk-weighted asset ratio of 7.25%, of which at least 3.25 percentage points must consist of Tier 1 capital. In other words, during this period upon to approximately 4 percentage points of the 7.25%

capital ratio may consist of Tier 2 capital. Also during this period, the sublimit on loan loss reserves will be 1.5% of risk-weighted assets.

[54 FR 4177, Jan. 27, 1989; 57 FR 40307, Sept. 3, 1992; 57 FR 44084, Sept. 24, 1992; 58 FR 16486, March 29, 1993; 59 FR 10952, 10953, March 9, 1994; 59 FR 60555, Nov. 25, 1994; 59 FR 66645, 66651, Dec. 28, 1994; 60 FR 7907, Feb. 10, 1995; 60 FR 17987, April 10, 1995; 60 FR 39229, Aug. 1, 1995; 60 FR 39493, Aug. 2, 1995; 60 FR 46174, 46176, Sept. 5, 1995; 60 FR 47458, Sept. 13, 1995; 60 FR 66044, Dec. 20, 1995]

<<PART 3
--MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES>>

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

Source: 50 FR 10216, March 14, 1985; 54 FR 4177, Jan. 27, 1989; 57 FR 40307, Sept. 3, 1992; 57 FR 44084, Sept. 24, 1992; 59 FR 60555, Nov. 25, 1994; 59 FR 64563, Dec. 15, 1994; 59 FR 66651, Dec. 28, 1994; 60 FR 17987, April 10, 1995, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER I--COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY
PART 3--MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix A to Part 3--Risk-Based Capital Guidelines

Section 1. Purpose, Applicability of Guidelines, and Definitions.

(a) Purpose. (1) An important function of the Office of the Comptroller of the Currency ('OCC') is to evaluate the adequacy of capital maintained by each national bank. Such an evaluation involves the consideration of numerous factors, including the riskiness of a bank's assets and off-balance sheet items. This Appendix A implements the OCC's risk-based capital guidelines. The risk-based capital ratio derived from those guidelines is more systematically sensitive to the credit risk associated with various bank activities than is a capital ratio based strictly on a bank's total balance sheet assets. A bank's risk-based capital ratio is obtained by dividing its capital base (as defined in section 2 of this Appendix A) by its risk-weighted assets (as calculated pursuant to section 3 of this Appendix A). These guidelines were created within the framework established by the report issued by the Committee on Banking Regulations and Supervisory Practices in July 1988. The OCC believes that the risk-based capital ratio is a useful tool in evaluating the capital adequacy of all national banks, not just those that are active in the international banking system.

(2) The purpose of this Appendix A is to explain precisely (i) how a national bank's risk-based capital ratio is determined and (ii) how these risk-based capital guidelines are applied to national banks. The OCC will review these guidelines periodically for possible adjustments commensurate with its experience with the risk-based capital ratio and with changes in the economy, financial markets and domestic and international banking practices.

(b) Applicability. (1) The risk-based capital ratio derived from these guidelines is an important factor in the OCC's evaluation of a bank's capital adequacy. However, since this measure addresses only credit risk, the 8% minimum ratio should not be viewed as the level to be targeted, but rather as a floor. The final supervisory judgment on a bank's capital adequacy is based on an individualized assessment of numerous factors, including those listed in 12 CFR 3.10. With respect to the consideration of these factors, the OCC will give particular attention to any bank with significant exposure to declines in the economic value of its capital due to changes in interest rates. As a result, it may differ from the conclusion drawn from an isolated comparison of a bank's risk-based capital ration to the 8% minimum specified in these guidelines. In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

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(2) Effective December 31, 1990, these risk-based capital guidelines will apply to all national banks. In the interim, banks must maintain minimum capital-to-total assets ratios as required by 12 CFR Part 3, and should begin preparing for the implementation of these risk-based capital guidelines. In this regard, each national bank that does not currently meet the final minimum ratio established in section 4(b)(1) of this Appendix A should begin planning for achieving that standard.

(3) These risk-based capital guidelines will not be applied to federal branches and agencies of foreign banks.

(c) Definitions. For purposes of this Appendix A, the following definitions apply:

(1) 'Allowances for loan and lease losses' means the balance of the valuation reserve on December 31, 1968, plus additions to the reserve charged to operations since that date, less losses charged against the allowance net of recoveries.

(2) 'Associated company' means any corporation, partnership, business trust, joint venture, association or similar organization in which a national bank directly or indirectly holds a 20 to 50 percent ownership interest.

(3) 'Banking and finance subsidiary' means any subsidiary of a national bank that engages in banking- and finance-related activities.

(4) 'Cash items in the process of collection' means **checks** or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation in the country in which the reporting bank's office that is **clearing** or collecting the **check** or draft is located; U.S. Government **checks** that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation in the United States or the country in which the reporting bank's office that is handling the drafts is located; and unposted debits.

(5) Central government means the national governing authority of a country; it includes the departments, ministries and agencies of the central government and the central bank. The U.S. Central Bank includes the 12 Federal Reserve Banks. The definition of central government does not include the following: State, provincial, or local governments; commercial enterprises owned by the central government, which are entities engaged in activities involving trade, commerce, or profit that are generally conducted or performed in the private sector of the United States economy; and non-central government entities whose obligations are guaranteed by the central government.

(6) 'Commitment' means any arrangement that obligates a national bank to: (i) Purchase loans or securities; or (ii) extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, or similar transactions.

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(7) 'Common stockholders' equity' means common stock, common stock surplus, undivided profits, capital reserves, and adjustments for the cumulative effect of foreign currency translation, less net unrealized holding losses on available-for-sale equity securities with readily determinable fair values.

(8) 'Conditional guarantee' means a contingent obligation of the United States Government or its agencies, or the central government of an OECD country, the validity of which to the beneficiary is dependent upon some affirmative action--e.g., servicing requirements--on the part of the beneficiary of the guarantee or a third party.

(9) Deferred tax assets means the tax consequences attributable to tax

carryforwards and deductible temporary differences. Tax carryforwards are deductions or credits that cannot be used for tax purposes during the current period, but can be carried forward to reduce taxable income or taxes payable in a future period or periods. Temporary differences are financial events or transactions that are recognized in one period for financial statement purposes, but are recognized in another period or periods for income tax purposes. Deductible temporary differences are temporary differences that result in a reduction of taxable income in a future period or periods.

(10) 'Derivative contract' means generally a financial contract whose value is derived from the values of one or more underlying assets, reference rates or indexes of asset values. Derivative contracts include interest rate, foreign exchange rate, equity, precious metals and commodity contracts, or any other instrument that poses similar credit risks.

(11) 'Depository institution' means a financial institution that engages in the business of banking; that is recognized as a bank by the bank supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the U.S., this definition encompasses all federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institution. Bank holding companies are excluded from this definition. For the purposes of assigning risk weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

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(12) 'Exchange rate contracts' include: Cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the OCC, gives rise to similar risks.

(13) 'Goodwill' means an intangible asset that represents the excess of the purchase price over the fair market value of tangible and identifiable intangible assets acquired in purchases accounted for under the purchase method of accounting.

(14) 'Intangible assets' include mortgage servicing rights, purchased credit card relationships (servicing rights), goodwill, favorable leaseholds, and core deposit value.

(15) 'Interest rate contracts' include: Single currency interest rate swaps; basis swaps; forward rate agreements; interest rate options purchased; forward forward deposits accepted; and any similar instrument that, in the opinion of the OCC, gives rise to similar risks, including when-issued securities.

(16) Multifamily residential property means any residential property consisting of five or more dwelling units including apartment buildings, condominiums, cooperatives, and other similar structures primarily for residential use, but not including hospitals, nursing homes, or other similar facilities.

< Text of subsection (c)(17) effective April 1, 1996. >

(17) The OECD-based group of countries comprises all full members of the Organization for Economic Cooperation and Development (OECD) regardless of entry

date, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow,1 but excludes any country that has rescheduled its external sovereign debt within the previous five years. These countries are hereinafter referred to as OECD countries. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

1 As of November 1995, the OECD included the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States; and Saudi Arabia had concluded special lending arrangements with the IMF associated with the IMF's General Arrangements to Borrow.

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< Text of subsection (c)(17) effective until April 1, 1996. >

(17) 'OECD-based country' means a member of the grouping of countries that are full members of the Organization of Economic Cooperation and Development, plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. These countries are hereinafter referred to as 'OECD countries'.

(18) 'Original maturity' means, with respect to a commitment, the earliest possible date after a commitment is made on which the commitment is scheduled to expire (i.e., it will reach its stated maturity and cease to be binding on either party), provided that either:

(i) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(ii) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the customer at the time of the extension or renewal and upon a new, bona fide credit analysis utilizing current information on financial condition and trends.

(19) 'Preferred stock' includes the following instruments: (i) 'Convertible preferred stock,' which means preferred stock that is mandatorily convertible into either common or perpetual preferred stock; (ii) 'Intermediate-term preferred stock,' which means preferred stock with an original maturity of at least five years, but less than 20 years; (iii) 'Long-term preferred stock,' which means preferred stock with an original maturity of 20 years or more; and (iv) 'Perpetual preferred stock,' which means preferred stock without a fixed maturity date that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. For purposes of these instruments, preferred stock that can be redeemed at the option of the holder is deemed to have an 'original maturity' of the earliest possible date on which it may be so redeemed.

(20) 'Public-sector entities' include states, local authorities and governmental subdivisions below the central government level in an OECD country. In the United States, this definition encompasses a state, county, city, town, or other municipal corporation, a public authority, and generally any publicly-owned entity that is an instrumentality of a state or municipal corporation. This definition does not include commercial companies owned by the public sector.1a

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1a See Definition (5), 'Central government,' for further explanation of commercial companies owned by the public sector.

(21) 'Reciprocal holdings of bank capital instruments' means cross-holdings or other formal or informal arrangements in which two or more banking organizations swap, exchange, or otherwise agree to hold each other's capital instruments. This definition does not include holdings of capital instruments issued by other banking organizations that were taken in satisfaction of debts previously contracted, provided that the reporting national bank has not held such instruments for more than five years or a longer period approved by the OCC.

(22) 'Replacement cost' means, with respect to interest rate and exchange rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. The mark-to-market process should incorporate changes in both interest rates and counterparty credit quality.

(23) 'Residential properties' means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence.

(24) 'Risk-weighted assets' means the sum of total risk-weighted balance sheet assets and the total of risk-weighted off-balance sheet credit equivalent amounts. Risk-weighted balance sheet and off-balance sheet assets are calculated in accordance with Section 3 of this appendix A.

(25) 'State' means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

(26) 'Subsidiary' means any corporation, partnership, business trust, joint venture, association or similar organization in which a national bank directly or indirectly holds more than a 50% ownership interest. This definition does not include ownership interests that were taken in satisfaction of debts previously contracted, provided that the reporting bank has not held the interest for more than five years or a longer period approved by the OCC.

(27) 'Total capital' means the sum of a national bank's core (Tier 1) and qualifying supplementary (Tier 2) capital elements.

(28) 'Unconditionally cancelable' means, with respect to a commitment-type lending arrangement, that the bank may, at any time, with or without cause, refuse to advance funds or extend credit under the facility. In the case of home equity lines of credit, the bank is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by relevant Federal law.

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(29) 'United States Government or its agencies' means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States Government.

(30) 'United States Government-sponsored agency' means an agency originally established or chartered to serve public purposes specified by the United States Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

(31) Walkaway clause means a provision in a bilateral netting contract that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

Section 2. Components of Capital.

A national bank's qualifying capital base consists of two types of capital--core (Tier 1) and supplementary (Tier 2).

(a) Tier 1 Capital. The following elements comprise a national bank's Tier 1 capital:

(1) Common stockholders' equity;

(2) Noncumulative perpetual preferred stock and related surplus; and 2

2 Preferred stock issues where the dividend is reset periodically based upon current market conditions and the bank's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to Tier 2 capital, regardless of whether the dividends are cumulative or noncumulative.

(3) Minority interests in the equity accounts of consolidated subsidiaries.

(b) Tier 2 Capital. The following elements comprise a national bank's Tier 2 capital:

(1) Allowance for loan and lease losses, up to a maximum of 1.25% of risk-weighted assets,3 subject to the transition rules in section 4(a)(2) of this appendix A;

3 The amount of the allowance for loan and lease losses that may be included in capital is based on a percentage of risk-weighted assets. The gross sum of risk-weighted assets used in this calculation includes all risk-weighted assets, with the exception of the assets required to be deducted under section 3 in establishing risk-weighted assets (i.e., the assets required to be deducted from capital under section 2(c)) of this appendix. A banking organization may deduct reserves for loan and lease losses in excess of the amount permitted to be included as capital, as well as allocated transfer risk reserves and reserves held against other real estate owned, from the gross sum of risk-weighted assets in computing the denominator of the risk-based capital ratio.

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(2) Cumulative perpetual preferred stock, long-term preferred stock, convertible preferred stock, and any related surplus, without limit, if the issuing national bank has the option to defer payment of dividends on these

instruments. For long-term preferred stock, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of the instrument (net of redemptions) at the beginning of each of the last five years of the life of the instrument;

(3) Hybrid capital instruments, without limit. Hybrid capital instruments are those instruments that combine certain characteristics of debt and equity, such as perpetual debt. To be included as Tier 2 capital, these instruments must meet the following criteria: 4

4 Mandatory convertible debt instruments that meet the requirements of 12 CFR 3.100(e)(5), or that have been previously approved as capital by the OCC, are treated as qualifying hybrid capital instruments.

(i) The instrument must be unsecured, subordinated to the claims of depositors and general creditors, and fully paid-up;

(ii) The instrument must not be redeemable at the option of the holder prior to maturity, except with the prior approval of the OCC;

(iii) The instrument must be available to participate in losses while the issuer is operating as a going concern (in this regard, the instrument must automatically convert to common stock or perpetual preferred stock, if the sum of the retained earnings and capital surplus accounts of the issuer shows a negative balance); and

(iv) The instrument must provide the option for the issuer to defer principal and interest payments, if

(A) The issuer does not report a net profit for the most recent combined four quarters, and

(B) The issuer eliminates cash dividends on its common and preferred stock.

(4) Term subordinated debt instruments, and intermediate-term preferred stock and related surplus are included in Tier 2 capital, but only to a maximum of 50% of Tier 1 capital as calculated after deductions pursuant to section 2(c) of this appendix. To be considered capital, term subordinated debt instruments must meet the requirements of 12 CFR 3.100(f)(1). Also, at the beginning of each of the last five years of the life of either type of instrument, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of that instrument (net of redemptions). 5

5 Capital instruments may be redeemed prior to maturity with the prior approval of the OCC. The OCC typically will consider requests for the redemption of capital instruments when the instruments are to be redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument. However, the OCC may deny redemption in such circumstances or allow redemption in other circumstances, based upon its evaluation of the circumstances of each case. The OCC must be notified in writing of any request for redemption at least 30 days in advance of such redemption pursuant to the procedures in Sec. 5.46 of this chapter.

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6 [Reserved].

(c) Deductions From Capital. The following items are deducted from the appropriate portion of a national bank's capital base when calculating its risk-based capital ratio:

(1) Deductions from Tier 1 capital. The following items are deducted from Tier 1 capital before the Tier 2 portion of the calculation is made:

(i) All goodwill subject to the transition rules contained in section 4(a)(1)(ii) of this appendix A;

(ii) Other intangible assets, except as provided in section 2(c)(2) of this appendix A; and

(iii) Deferred tax assets, except as provided in section 2(c)(3) of this appendix A, that are dependent upon future taxable income, which exceed the lesser of either:

(A) The amount of deferred tax assets that the bank could reasonably expect to realize within one year of the quarter-end Call Report, based on its estimate of future taxable income for that year; or

(B) 10% of Tier 1 capital, net of goodwill and all intangible assets other than mortgage servicing rights and purchased credit card relationships, and before any disallowed deferred tax assets are deducted.

(2) Qualifying intangible assets. Subject to the following conditions, mortgage servicing rights (originated and purchased) and purchased credit card relationships need not be deducted from Tier 1 capital:

(i) The total of all intangible assets which are included in Tier 1 capital is limited to 50 percent of Tier 1 capital, of which no more than 25 percent of Tier 1 capital can consist of purchased credit card relationships. Calculation of these limitations must be based on Tier 1 capital net of goodwill and other disallowed intangible assets.

(ii) Each intangible asset which is included in Tier 1 capital must be valued at the lesser of:

(A) 90 percent of the fair market value of the intangible asset, determined in accordance with section 2(c)(2)(iii) of this appendix A; or

(B) 100 percent of the remaining unamortized book value of the intangible asset, determined at least quarterly in accordance with the instructions of the Call Report.

(iii) Banks shall determine the current fair market value of each intangible asset included in Tier 1 capital at least quarterly. The quarterly determination of the current fair market value of the intangible asset must include adjustments for any significant changes in original valuation assumptions, including changes in prepayment estimates. In determining the current fair market value of the intangible asset, the bank shall apply an appropriate market discount rate to the expected net cash flows of the intangible asset.

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(3) Deferred tax assets--(i) Net unrealized gains and losses on available-for-sale securities. Before calculating the amount of deferred tax assets subject to the limit in section 2(c)(1)(iii) of this appendix A, a bank may eliminate the deferred tax effects of any net unrealized holding gains and losses on available-for-sale debt securities. Banks report these net unrealized holding gains and losses in their Call Reports as a separate component of equity capital, but exclude them from the definition of common stockholders' equity for regulatory capital purposes. A bank that adopts a policy to deduct these amounts must apply that approach consistently in all future calculations of the amount of disallowed deferred tax assets under section 2(c)(1)(iii) of this appendix A.

(ii) Consolidated groups. The amount of deferred tax assets that a bank can realize from taxes paid in prior carryback years and from reversals of existing taxable temporary differences generally would not be deducted from capital. However, for a bank that is a member of a consolidated group (for tax purposes),

the amount of carryback potential a bank may consider in calculating the limit on deferred tax assets under section 2(c)(1)(iii) of this appendix A, may not exceed the amount that the bank could reasonably expect to have refunded by its parent holding company.

(iii) Nontaxable Purchase Business Combination. In calculating the amount of net deferred tax assets under section 2(c)(1)(iii) of this appendix A, a deferred tax liability that is specifically associated with an intangible asset (other than purchased mortgage servicing rights and purchased credit card relationships) due to a nontaxable purchase business combination may be netted against that intangible asset. Only the net amount of the intangible asset must be deducted from Tier 1 capital. Deferred tax liabilities netted in this manner cannot also be netted against deferred tax assets when determining the amount of net deferred tax assets that are dependent upon future taxable income.

(iv) Estimated future taxable income. Estimated future taxable income does not include net operating loss carryforwards to be used during that year or the amount of existing temporary differences expected to reverse within the year. A bank may use future taxable income projections for their closest fiscal year, provided it adjusts the projections for any significant changes that occur or that it expects to occur. Such projections must include the estimated effect of tax planning strategies that the bank expects to implement to realize net operating losses or tax credit carryforwards that will otherwise expire during the year.

(4) Deductions from total capital. The following items are deducted from total capital:

(i) Investments, both equity and debt, in unconsolidated banking and finance subsidiaries that are deemed to be capital of the subsidiary;7 and

7 The OCC may require deduction of investments in other subsidiaries and associated companies, on a case-by-case basis.

(ii) Reciprocal holdings of bank capital instruments.

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

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The denominator of the risk-based capital ratio, i.e., a national bank's risk-weighted assets,8 is derived by assigning that bank's assets and off-balance sheet items to one of the four risk categories detailed in section 3(a) of this Appendix A. Each category has a specific risk weight. Before an off-balance sheet item is assigned a risk weight, it is converted to an on-balance sheet credit equivalent amount in accordance with section 3(b) of this Appendix A. The risk weight assigned to a particular asset or on-balance sheet credit equivalent amount determines the percentage of that asset/credit equivalent that is included in the denominator of the bank's risk-based capital ratio. Any asset deducted from a bank's capital in computing the numerator of the risk-based capital ratio is not included as part of the bank's risk-weighted assets.

8 The OCC reserves the right to require a bank to compute its risk-based capital ratio on the basis of average, rather than period-end, risk-weighted assets when necessary to carry out the purposes of these

guidelines.

Some of the assets on a bank's balance sheet may represent an indirect holding of a pool of assets, e.g., mutual funds, that encompasses more than one risk weight within the pool. In those situations, the asset is assigned to the risk category applicable to the highest risk-weighted asset that pool is permitted to hold pursuant to its stated investment objectives. However, the minimum risk weight that may be assigned to such a pool is 20%. If, in order to maintain a necessary degree of liquidity, the fund is permitted to hold an insignificant amount of its investments in short-term, highly-liquid securities of superior credit quality (that do not qualify for a preferential risk weight), such securities generally will not be taken into account in determining the risk category into which the bank's holding in the overall pool should be assigned. More detail on the treatment of mortgage-backed securities is provided in section 3(a)(3)(vi) of this appendix A.

(a) On-Balance Sheet Assets. The following are the risk categories/weights for on-balance sheet assets.

(1) Zero percent risk weight. (i) Cash, including domestic and foreign currency owned and held in all offices of a national bank or in transit. Any foreign currency held by a national bank should be converted into U.S. dollar equivalents.

(ii) Deposit reserves and other balances at Federal Reserve Banks.

(iii) Securities issued by, and other direct claims on, the United States Government or its agencies, or the central government of an OECD country.

(iv) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.9

9 For the treatment of privately-issued mortgage-backed securities where the underlying pool is comprised solely of mortgage-related securities issued by GNMA, see infra note 10.

(v) That portion of local currency claims on or unconditionally guaranteed by central governments of non-OECD countries, to the extent the bank has local currency liabilities in that country. Any amount of such claims that exceeds the amount of the bank's local currency liabilities is assigned to the 100% risk category of section 3(a)(4) of this appendix.

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(vi) Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.

(vii) The book value of paid-in Federal Reserve Bank stock.

(viii) That portion of assets and off-balance sheet transactions9a collateralized by cash or securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, provided that:9b

9a See footnote 22 in section 3(b)(5)(iii) of this appendix A (collateral held against derivative contracts).

9b Assets and off-balance sheet transactions collateralized by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country include, but are not limited to,

securities lending transactions, repurchase agreements, collateralized letters of credit, such as reinsurance letters of credit, and other similar financial guarantees. Swaps, forwards, futures, and options transactions are also eligible, if they meet the collateral requirements. However, the OCC may at its discretion require that certain collateralized transactions be risk weighted at 20 percent if they involve more than a minimal risk.

(A) The bank maintains control over the collateral:
(1) If the collateral consists of cash, the cash must be held on deposit by the bank or by a third-party for the account of the bank;
(2) If the collateral consists of OECD government securities, then the OECD government securities must be held by the bank or by a third-party acting on behalf of the bank;
(B) The bank maintains a daily positive margin of collateral fully taking into account any change in the market value of the collateral held as security;
(C) Where the bank is acting as a customer's agent in a transaction involving the loan or sale of securities that is collateralized by cash or OECD government securities delivered to the bank, any obligation by the bank to indemnify the customer is limited to no more than the difference between the market value of the securities lent and the market value of the collateral received, and any reinvestment risk associated with the collateral is borne by the customer; and
(D) The transaction involves no more than minimal risk.
(2) 20 percent risk weight. (i) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category, but are assigned to the 100% risk category of section 3(a)(4) of this appendix A.

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(ii) Claims on, or guaranteed by depository institutions, other than the central bank, incorporated in a non-OECD country, with a residual maturity of one year or less.
(iii) Cash items in the process of collection.
(iv) That portion of assets collateralized by cash or by securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, that does not qualify for the zero percent risk-weight category.
(v) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.
(vi) Securities issued by, or other direct claims on, United States Government-sponsored agencies.
(vii) That portion of assets guaranteed by United States Government-sponsored agencies.10

10 Privately issued mortgage-backed securities, e.g., CMOs and REMICs, where

the underlying pool is comprised solely of mortgage-related securities issued by GNMA, FNMA and FHLMC, will be treated as an indirect holding of the underlying assets and assigned to the 20% risk category of this section 3(a)(2). If the underlying pool is comprised of assets which attract different risk weights, e.g., FNMA securities and conventional mortgages, the bank should generally assign the security to the highest risk category appropriate for any asset in the pool. However, on a case-by-case basis, the OCC may allow the bank to assign the security proportionately to the various risk categories based on the proportion in which the risk categories are represented by the composition cash flows of the underlying pool of assets. Before the OCC will consider a request to proportionately risk-weight such a security, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of assets. Furthermore, before a mortgage-related security will receive a risk weight lower than 100%, it must meet the criteria set forth in section 3(a)(3)(vi) of this appendix A.

(viii) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies.

(ix) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity. In the U.S., these obligations must meet the requirements of 12 CFR 1.3(g).

(x) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.11

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11 These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

(xi) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.

(xii) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the bank has local currency liabilities in that country. Any amount of such claims that exceeds the amount of the bank's local currency liabilities is assigned to the 100% risk category of section 3(a)(4) of this appendix.

(3) 50 percent risk weight. (i) Revenue obligations of any public-sector entity in an OECD country for which the underlying obligor is the public-sector entity, but which are repayable solely from the revenues generated by the project financed through the issuance of the obligations.

(ii) The credit equivalent amount of derivative contracts, calculated in accordance with section 3(b)(5) of this Appendix A, that do not qualify for inclusion in a lower risk category.

(iii) Loans secured by first mortgages on one-to-four family residential properties, either owner-occupied or rented, provided that such loans are not

otherwise 90 days or more past due, or on nonaccrual or restructured. It is presumed that such loans will meet prudent underwriting standards. Furthermore, residential property loans that are made for the purpose of construction financing are assigned to the 100% risk category of section 3(a)(4) of this Appendix A; however, this exclusion from the 50% risk category does not apply to loans to individual purchasers for the construction of their own homes.

(iv) Loans to residential real estate builders for one-to-four family residential property construction, if the bank obtains, prior to the making of the construction loan, sufficient documentation demonstrating that the buyer of the home intends to purchase the home (i.e., a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (i.e., a firm written commitment for permanent financing of the home upon completion), subject to the following additional criteria:

(A) The builder must incur at least the first 10% of the direct costs (i.e., actual costs of the land, labor, and material) before any drawdown is made under the construction loan and the construction loan may not exceed 80% of the sales price of the resold home;

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(B) The individual purchaser has made a substantial 'earnest money deposit' of no less than 3% of the sales price of the home that must be subject to forfeiture by the individual purchaser if the sales contract is terminated by the individual purchaser; however, the earnest money deposit shall not be subject to forfeiture by reason of breach or termination of the sales contract on the part of the builder;

(C) The earnest money deposit must be held in escrow by the bank financing the builder or by an independent party in a fiduciary capacity; the escrow agreement must provide that in the event of default the escrow funds must be used to defray any cost incurred relating to any cancellation of the sales contract by the buyer;

(D) If the individual purchaser terminates the contract or if the loan fails to satisfy any other criterion under this section, then the bank must immediately recategorize the loan at a 100% risk weight and must accurately report the loan in the bank's next quarterly Consolidated Reports of Condition and Income (Call Report);

(E) The individual purchaser must intend that the home will be owner-occupied;

(F) The loan is made by the bank in accordance with prudent underwriting standards;

(G) The loan is not more than 90 days past due, or on nonaccrual; and

(H) The purchaser is an individual(s) and not a partnership, joint venture, trust, corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing one or more of the homes for speculative purposes.

(v) Loans secured by a first mortgage on multifamily residential properties :11a

11a The portion of multifamily residential property loans that is sold subject to a pro rata loss sharing arrangement may be treated by the selling bank as sold to the extent that the sales agreement provides for the purchaser of the loan to share in any loss incurred on the loan on a pro rata basis with the selling bank. The portion of multifamily residential property loans sold subject to any loss sharing arrangement other than pro rata sharing of the loss shall be accorded the same

treatment as any other asset sold under an agreement to repurchase or sold with recourse under section 3(b)(1)(iii) (footnote 14) of this appendix A.

(A) The amortization of principal and interest occurs in not more than 30 years;

(B) The minimum original maturity for repayment of principal is not less than 7 years;

(C) All principal and interest payments have been made on a timely basis in accordance with the terms of the loan for at least one year immediately preceding the risk weighting of the loan in the 50% risk weight category, and the loan is not otherwise 90 days or more past due, or on nonaccrual status;

(D) The loan is made in accordance with all applicable requirements and prudent underwriting standards;

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(E) If the rate of interest does not change over the term of the loan:

(I) The current loan amount outstanding does not exceed 80% of the current value of the property, as measured by either the value of the property at origination of the loan (which is the lower of the purchase price or the value as determined by the initial appraisal, or if appropriate, the initial evaluation) or the most current appraisal, or if appropriate, the most current evaluation; and

(II) In the most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120%;11b

11b For the purposes of the debt service requirements in sections 3(a)(3)(v)(E)(II) and 3(a)(3)(v)(F)(II) of this appendix A, other forms of debt service coverage that generate sufficient cash flows to provide comparable protection to the institution may be considered for (a) a loan secured by cooperative housing or (b) a multifamily residential property loan if the purpose of the loan is for the development or purchase of multifamily residential property primarily intended to provide low- to moderate-income housing, including special operating reserve accounts or special operating subsidies provided by federal, state, local or private sources. However, the OCC reserves the right, on a case-by-case basis, to review the adequacy of any other forms of comparable debt service coverage relied on by the bank.

(F) If the rate of interest changes over the term of the loan:

(I) The current loan amount outstanding does not exceed 75% of the current value of the property, as measured by either the value of the property at origination of the loan (which is the lower of the purchase price or the value as determined by the initial appraisal, or if appropriate, the initial evaluation) or the most current appraisal, or if appropriate, the most current evaluation; and

(II) In the most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115%; and

(G) If the loan was refinanced by the borrower:

(I) All principal and interest payments on the loan being refinanced which were made in the preceding year prior to refinancing shall apply in determining the one-year timely payment requirement under paragraph (a)(3)(v)(C) of this section; and

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(II) The net operating income generated by the property in the preceding year prior to refinancing shall apply in determining the applicable debt service requirements under paragraphs (a)(3)(v)(E) and (a)(3)(v)(F) of this section.

(vi) Privately-issued mortgage-backed securities, i.e. those that do not carry the guarantee of a government or government-sponsored agency, if the privately-issued mortgage-backed securities are at the time the mortgage-backed securities are originated fully secured by or otherwise represent a sufficiently secure interest in mortgages that qualify for the 50% risk weight under paragraphs (a)(3) (iii), (iv) and (v) of this section,12 provided that they meet the following criteria:

12 If all of the underlying mortgages in the pool do not qualify for the 50% risk weight, the bank should generally assign the entire value of the security to the 100% risk category of section 3(a)(4) of this Appendix A; however, on a case-by-case basis, the OCC may allow the bank to assign only the portion of the security which represents an interest in, and the cash flows of, nonqualifying mortgages to the 100% risk category, with the remainder being assigned a risk weight of 50%. Before the OCC will consider a request to risk weight a mortgage-backed security on a proportionate basis, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of mortgages.

(A) The underlying assets must be held by an independent trustee that has a first priority, perfected security interest in the underlying assets for the benefit of the holders of the security;

(B) The holder of the security must have an undivided pro rata ownership interest in the underlying assets or the trust that issues the security must have no liabilities unrelated to the issued securities;

(C) The trust that issues the security must be structured such that the cash flows from the underlying assets fully meet the cash flows requirements of the security without undue reliance on any reinvestment income; and

(D) There must not be any material reinvestment risk associated with any funds awaiting distribution to the holder of the security.

(4) 100 percent risk weight. All other assets not specified above, including, but not limited to:

(i) Claims on or guaranteed by depository institutions incorporated in a non-OECD country, as well as claims on the central bank of a non-OECD country, with a residual maturity exceeding one year.

(ii) All non-local currency claims on non-OECD central governments, as well as local currency claims on non-OECD central governments that are not included in section 3(a)(1)(v) of this appendix A.

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(iii) Any classes of a mortgage-backed security that can absorb more than their pro rata share of the principal loss without the whole issue being in default, e.g., subordinated classes or residual interests, regardless of the issuer or guarantor.

(iv) All stripped mortgage-backed securities, including interest only portions (IOs), principal only portions (POs) and other similar instruments, regardless of the issuer or guarantor.

(v) Obligations issued by any state or any political subdivision thereof for

the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligation, e.g., industrial development bonds.

(vi) Claims on commercial enterprises owned by non-OECD and OECD central governments.

(vii) Any investment in an unconsolidated subsidiary that is not required to be deducted from total capital pursuant to section 2(c)(3) of this appendix A.

(viii) Instruments issued by depository institutions incorporated in OECD and non-OECD countries that qualify as capital of the issuer.

(ix) Investments in fixed assets, premises, and other real estate owned.

(b) Off-Balance Sheet Activities. The risk weight assigned to an off-balance sheet item is determined by a two-step process. First, the face amount of the off-balance sheet item is multiplied by the appropriate credit conversion factor specified in this section. This calculation translates the face amount of an off-balance sheet item into an on-balance sheet credit equivalent amount. Second, the resulting credit equivalent amount is then assigned to the proper risk category using the criteria regarding obligors, guarantors, and collateral listed in section 3(a) of this appendix A. Collateral and guarantees are applied to the face amount of an off-balance sheet item; however, with respect to derivative contracts under section 3(b)(5) of this appendix A, collateral and guarantees are applied to the credit equivalent amounts of such derivative contracts. The following are the credit conversion factors and the off-balance sheet items to which they apply.

(1) 100 percent credit conversion factor. (i) Direct credit substitutes, including financial guarantee-type standby letters of credit that support financial claims on the account party.13 The face amount of a direct credit substitute is netted against the amount of any participations sold in that item. The amount not sold is converted to an on-balance sheet credit equivalent and assigned to the proper risk category using the criteria regarding obligors, guarantors and collateral listed in section 3(a) of this appendix A. Participations are treated as follows:

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13 For purposes of this section 3(b)(1)(i), a 'financial guarantee-type standby letter of credit' is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party or (2) to make payment on account of any indebtedness undertaken by the account party, in the event that the account party fails to fulfill its obligation to the beneficiary. Performance-based standby letters of credit are defined differently in section 3(b)(2)(i), infra note 16.

(A) If the originating bank remains liable to the beneficiary for the full amount of the standby letter of credit, in the event the participant fails to perform under its participation agreement, the amount of participations sold are converted to an on-balance sheet credit equivalent using a credit conversion factor of 100%, with that amount then being assigned to the risk category appropriate for the purchaser of the participation.

(B) If the participations are such that each participant is responsible only for its pro rata share of the risk, and there is no recourse to the originating bank, the full amount of the participations sold is excluded from the

originating bank's risk-weighted assets;

(ii) Risk participations purchased in bankers' acceptances and participations purchased in direct credit substitutes;

(iii) Assets sold under an agreement to repurchase and assets sold with recourse,14 to the extent that these assets are not reported on a national bank's statement of condition (this includes loan strips sold without direct recourse, where the maturity of the participation is shorter than the maturity of the underlying loan); and

14 For risk-based capital purposes, the definition of the sale of assets with recourse, including one-to-four family residential mortgages, is generally the same as the definition contained in the Instructions for the Preparation of the Consolidated Reports of Condition and Income (the Call Report). Assets sold in transactions in which the bank retains risk in a manner constituting recourse under the Call Report instructions, but which are not reported on the bank's statement of condition, are included in section 3(b)(1)(iii), even though the Call Report allows such transfers to be reported as sales. However, mortgage loans sold in transactions in which the bank retains only an insignificant amount of risk and makes concurrent provision for that risk are not considered assets sold with recourse under section 3. In order to qualify for sales treatment, such transactions must meet three conditions: (1) The bank has not retained any significant risk of loss, either directly or indirectly; (2) The bank's maximum contractual exposure under the recourse provision (or through the retention of a subordinated interest in the mortgages) at the time of the transfer is equal to or less than the amount of probable loss that the bank has reasonably estimated that it will incur on the transferred mortgages; and (3) The bank must have created a liability account or other special reserve in an amount equal to its maximum exposure. The amount of this liability account or other special reserve may not be included in capital for the purpose of determining compliance with either the risk-based capital requirement or the leverage ratio; nor may it be included in the allowance for loan and lease losses.

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(iv) Contingent obligations with a certain draw down, e.g., legally binding agreements to purchase assets as a specified future date.

(v) Indemnification of customers whose securities the bank has lent as agent. If the customer is not indemnified against loss by the bank, the transaction is excluded from the risk-based capital calculation.15

15 When a bank lends its own securities, the transaction is treated as a loan. When a bank lends its own securities or, acting as agent, agrees to indemnify a customer, the transaction is assigned to the risk weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf.

(2) 50 percent credit conversion factor. (i) Transaction-related contingencies including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction.16 To the extent permitted by law or regulation, performance-based

standby letters of credit include such things as arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids;

16 For purposes of this section 3(b)(2)(i), a 'performance-based standby letter of credit' is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by the account party in the performance of a nonfinancial or commercial obligation. Participations in performance-based standby letters of credit are treated in accordance with the provisions of section 3(b)(1)(i)(A)&(B) of this appendix A. Financial guarantee-type standby letters of credit are defined in section 3(b)(1)(i), supra note 13.

(ii) Unused portion of commitments, including home equity lines of credit, with an original maturity exceeding one year; 17 and

17 Participations in commitments are treated in accordance with the provisions of section 3(b)(1)(i)(A)&(B) of this appendix A. Until December 31, 1992, national banks will be permitted to use remaining maturity in determining the appropriate credit conversion factor for the unused portion of loan commitments.

(iii) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the bank's customer can issue short-term debt obligations in its own name, but for which the bank has a legally binding commitment to either:

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(A) Purchase the obligations the customer is unable to sell by a stated date; or

(B) Advance funds to its customer, if the obligations cannot be sold.

(3) 20 percent credit conversion factor. (i) Trade-related contingencies. These are short-term self-liquidating instruments used to finance the movement of goods and are collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(4) Zero percent credit conversion factor.

(i) Unused portion of commitments with an original maturing of one year or less;

(ii) Unused portion of commitments with an original maturity of greater than one year, if they are unconditionally cancelable 18 at any time at the option of the bank and the bank has the contractual right to make, and in fact does make, either--

18 See section 1(c)(26) of appendix A to this part.

(A) A separate credit decision based upon the borrower's current financial condition, before each drawing under the lending facility; or

(B) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(iii) The unused portion of retail credit card lines or other related plans

that are unconditionally cancelable by the bank in accordance with applicable law.

(5) Derivative contracts. (i) Calculation of credit equivalent amounts. The credit equivalent amount of a derivative contract equals the sum of the current credit exposure and the potential future credit exposure of the derivative contract. The calculation of credit equivalent amounts must be measured in U.S. dollars, regardless of the currency or currencies specified in the derivative contract.

(A) Current credit exposure. The current credit exposure for a single derivative contract is determined by the mark-to-market value of the derivative contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market is zero or negative, then the current credit exposure is zero. The current credit exposure for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract is determined as provided by section 3(b)(5)(ii)(A) of this appendix A.

(B) Potential future credit exposure. The potential future credit exposure for a single derivative contract, including a derivative contract with negative mark-to-market value, is calculated by multiplying the notional principal19 of the derivative contract by one of the credit conversion factors in Table A--Conversion Factor Matrix of this appendix A, for the appropriate category.20 The potential future credit exposure for gold contracts shall be calculated using the foreign exchange rate conversion factors. For any derivative contract that does not fall within one of the specified categories in Table A--Conversion Factor Matrix of this appendix A, the potential future credit exposure shall be calculated using the other commodity conversion factors. Subject to examiner review, banks should use the effective rather than the apparent or stated notional amount in calculating the potential future credit exposure. The potential future credit exposure for multiple derivatives contracts executed with a single counterparty and subject to a qualifying bilateral netting contract is determined as provided by section 3(b)(5)(ii)(A) of this appendix A.

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19 For purposes of calculating either the potential future credit exposure under section 3(b)(5)(i)(B) of this appendix A or the gross potential future credit exposure under section 3(b)(5)(ii)(A)(2) of this appendix A for foreign exchange contracts and other similar contracts in which the notional principal is equivalent to the cash flows, total notional principal is the net receipts to each party falling due on each value date in each currency.

20 No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

Table A--Conversion Factor Matrix [FN1]

Remaining maturity [FN2]	Interest rate	Foreign exchange rate and gold	Equity [FN2]	Precious metals	Other commodity

One year or less	0.0	1.0	6.0	7.0	10.0
Over one to five years	0.5	5.0	8.0	7.0	12.0
Over five years	1.5	7.5	10.0	8.0	15.0

FN1 For derivative contracts with multiple exchanges of principal, the conversion factors are multiplied by the number of remaining payments in the derivative contract.

FN2 For derivative contracts that automatically reset to zero value following a payment, the remaining maturity equals the time until the next payment. However, interest rate contracts with remaining maturities of greater than one year shall be subject to a minimum conversion factor of 0.5 percent.

(ii) Derivative contracts subject to a qualifying bilateral netting contract.

(A) Netting calculation. The credit equivalent amount for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract as provided by section (3)(b)(5)(ii)(B) of this appendix A is calculated by adding the net current credit exposure and the adjusted sum of the potential future credit exposure for all derivative contracts subject to the qualifying bilateral netting contract.

(1) Net current credit exposure. The net current credit exposure is the net sum of all positive and negative mark-to-market values of the individual derivative contracts subject to a qualifying bilateral netting contract. If the net sum of the mark-to-market value is positive, then the net current credit exposure equals that net sum of the mark-to-market value. If the net sum of the mark-to-market value is zero or negative, then the net current credit exposure is zero.

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(2) Adjusted sum of the potential future credit exposure. The adjusted sum of the potential future credit exposure is calculated as:

A subnet =0.4XA subgross +(0.6XNGRXA subgross)

A subnet is the adjusted sum of the potential future credit exposure, A subgross is the gross potential future credit exposure, and NGR is the net to gross ratio. A subgross is the sum of the potential future credit exposure (as determined under section 3(b)(5)(i)(B) of this appendix A) for each individual derivative contract subject to the qualifying bilateral netting contract. The NGR is the ratio of the net current credit exposure to the gross current credit exposure. In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under section 3(b)(5)(i)(A) of this appendix A) of all individual derivative contracts subject to the qualifying bilateral netting contract.

(B) Qualifying bilateral netting contract. In determining the current credit exposure for multiple derivative contracts executed with a single counterparty, a bank may net derivative contracts subject to a qualifying bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(1) The qualifying bilateral netting contract is in writing.

(2) The qualifying bilateral netting contract is not subject to a walkaway clause.

(3) The qualifying bilateral netting contract creates a single legal obligation for all individual derivative contracts covered by the qualifying bilateral netting contract. In effect, the qualifying bilateral netting

contract must provide that the bank would have a single claim or obligation either to receive or to pay only the net amount of the sum of the positive and negative mark-to-market values on the individual derivative contracts covered by the qualifying bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the qualifying bilateral netting contract has been assigned, fails to perform due to any of the following events: default, insolvency, bankruptcy, or other similar circumstances.

(4) The bank obtains a written and reasoned legal opinion(s) that represents, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy, or similar circumstances, the relevant court and administrative authorities would find the bank's exposure to be the net amount under:

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(i) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(ii) The law of the jurisdiction that governs the individual derivative contracts covered by the bilateral netting contract; and

(iii) The law of the jurisdiction that governs the qualifying bilateral netting contract.

(5) The bank establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the qualifying bilateral netting contract continues to satisfy the requirement of this section.

(6) The bank maintains in its files documentation adequate to support the netting of a derivative contract.21

21 By netting individual derivative contracts for the purpose of calculating its credit equivalent amount, a bank represents that documentation adequate to support the netting of a set of derivative contract is in the bank's files and available for inspection by the OCC. Upon determination by the OCC that a bank's files are inadequate or that a qualifying bilateral netting contract may not be legally enforceable in any one of the bodies of law described in section 3(b)(5)(ii)(B)(3)(i) through (iii) of this appendix A, the underlying derivative contracts may not be netted for the purposes of this section.

(iii) Risk weighting. Once the bank determines the credit equivalent amount for a derivative contract or a set of derivative contracts subject to a qualifying bilateral netting contract, the bank assigns that amount to the risk weight category appropriate to the counterparty, or, if relevant, the nature of any collateral or guarantee.22 However, the maximum weight that will be applied to the credit equivalent amount of such derivative contract(s) is 50 percent.

22 Derivative contracts are an exception to the general rule of applying collateral and guarantees to the face value of off-balance sheet items. The sufficiency of collateral and guarantees is determined on the basis of the credit equivalent amount of derivative contracts. However, collateral and guarantees held against a qualifying bilateral netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the qualifying bilateral netting contract.

(iv) Exceptions. The following derivative contracts are not subject to the above calculation, and therefore, are not part of the denominator of a national bank's risk-based capital ratio:

(A) An exchange rate contract with an original maturity of 14 calendar days or less;23 and

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23 Notwithstanding section 3(b)(5)(B) of this appendix A, gold contracts do not qualify for this exception.

(B) A derivative contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(c) Alternative Capital Calculation for Small Business Obligations. (1) Definitions. For purposes of this section 3(c):

(i) Qualified bank means a bank that:

(A) Is well capitalized as defined in 12 CFR 6.4 without applying the capital treatment described in this section 3(c), or

(B) Is adequately capitalized as defined in 12 CFR 6.4 without applying the capital treatment described in this section 3(c) and has received written permission from the appropriate district office of the OCC to apply the capital treatment described in this section 3(c).

(ii) Recourse has the meaning given to such term under generally accepted accounting principles.

(iii) Small business means a business that meets the criteria for a small business concern established by the Small Business Administration in 13 CFR part 121 pursuant to 15 U.S.C. 632.

(2) Capital and reserve requirements. With respect to a transfer of a small business loan or a lease of personal property with recourse that is a sale under generally accepted accounting principles, a qualified bank may elect to apply the following treatment:

(i) The bank establishes and maintains a non-capital reserve under generally accepted accounting principles sufficient to meet the reasonable estimated liability of the bank under the recourse arrangement;

(ii) For purposes of calculating the bank's risk-based capital ratio, the bank includes only the amount of its retained recourse in its risk-weighted assets; and

(iii) For purposes of calculating the bank's tier 1 leverage ratio, the bank excludes from its average total consolidated assets the outstanding principal amount of the small business loans and leases transferred with recourse.

(3) Limit on aggregate amount of recourse. The total outstanding amount of recourse retained by a qualified bank with respect to transfers of small business loans and leases of personal property and included in the risk-weighted assets of the bank as described in section 3(c)(2) of this appendix A may not exceed 15 percent of the bank's total capital after adjustments and deductions, unless the OCC specifies a greater amount by order.

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(4) Bank that ceases to be qualified or that exceeds aggregate limit. If a bank ceases to be a qualified bank or exceeds the aggregate limit in section 3(c)(3) of this appendix A, the bank may continue to apply the capital treatment described in section 3(c)(2) of this appendix A to transfers of small business loans and leases of personal property that occurred when the bank was qualified

and did not exceed the limit.

(5) Prompt Corrective Action not affected. (i) A bank shall compute its capital without regard to this section 3(c) for purposes of prompt corrective action (12 U.S.C. 1831o and 12 CFR part 6) unless the bank is an adequately or well capitalized bank (without applying the capital treatment described in this section 3(c)) and, after applying the capital treatment described in this section 3(c), the bank would be well capitalized.

(ii) A bank shall compute its capital without regard to this section 3(c) for purposes of 12 U.S.C. 1831o(g) regardless of the bank's capital level.

(d) Recourse Obligations. Where the amount of recourse liability retained by a bank is less than the capital requirement for credit-risk exposure, the bank shall maintain capital for the recourse liability equal to the amount of credit-risk exposure retained. Any recourse liability that is subject to this section 3(c) is not subject to any additional capital treatment under sections 3(a) or 3(b) of this appendix A.

Section 4. Implementation, Transition Rules, and Target Ratios

(a) December 31, 1990 to December 30, 1992. During this time period:

(1) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 7.25%.

(i) Fifty percent of this 7.25% must be made up of Tier 1 capital; however, up to 10% of Tier 1 capital can be comprised of Tier 2 capital elements, before any deductions for goodwill. The amount of Tier 2 elements included in Tier 1 will not be subject to the sublimits on the amount of such elements in Tier 2 capital, with the exception of the allowance for loan and lease losses.

(ii) Goodwill that national banks have been allowed to count as capital as a result of the transition rules contained in 12 CFR 3.3 is grandfathered until December 31, 1992, but will be deducted from Tier 1 capital after that date.

(2) The allowance for loan and lease losses can be included in total capital up to a maximum of 1.5% of a bank's risk-weighted assets, including the portion that can be borrowed to make up Tier 1.

(3) Tier 2 capital elements that are not used as part of Tier 1 capital will qualify as part of a national bank's total capital base up to a maximum of 100% of the bank's Tier 1 capital.

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(4) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

(b) On December 31, 1992. (1) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 8.0%.

(2) Tier 2 capital elements qualify as part of a national bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital.

(3) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

Table 1--Summary of Risk Weights and Risk Categories

Category 1: Zero Percent

1. Cash (domestic and foreign).
2. Balances due from, and claims on, Federal Reserve Banks and central banks

in other OECD countries.

3. Claims on, or unconditionally guaranteed by, the U.S. Government or its agencies, or other OECD central governments.1

1 For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely repayment of principal and interest by the full faith and credit of the U.S. Government.

4. That portion of local currency claims on or unconditionally guaranteed by non-OECD central governments to the extent the bank has local currency liabilities in that country.

5. Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.

6. Federal Reserve Bank stock.

Category 2: 20 Percent

1. Portions of loans and other assets collateralized by securities issued or guaranteed by the U.S. Government or its agencies, or other OECD central governments.2

2 Degree of collateralization is determined by current market value.

2. Portions of loans and other assets conditionally guaranteed by the U.S. Government or its agencies, or other OECD central governments.

3. Portions of loans and other assets collateralized by cash on deposit in the lending institution.

4. All claims (long- and short-term) on, or guaranteed by, OECD depository institutions.

5. Claims on, or guaranteed by, non-OECD depository institutions with a residual maturity of one year or less.

6. Cash items in the process of collection.

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7. Securities and other claims on, or guaranteed by, U.S. Government-sponsored agencies.3

3 For the purpose of calculating the risk-based capital ratio, a U.S. Government-sponsored agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government.

8. Portions of loans and other assets collateralized by securities issued by, or guaranteed by, U.S. Government-sponsored agencies.4

4 Degree of collateralization is determined by current market value.

9. Claims that represent general obligations of, and portions of claims

guaranteed by, public-sector entities in OECD countries, below the level of central government.

10. Claims on or guaranteed by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.

11. Portions of loans and other assets collateralized with securities issued by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.

12. That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the bank has local currency liabilities in that country.

Category 3: 50 Percent

1. Revenue bonds or similar obligations, including loans and leases, that are obligations of public sector entities in OECD countries, but for which the government entity is committed to repay the debt only out of revenues from the facilities financed.

2. Credit equivalent amounts of interest rate and exchange rate related contracts, except for those assigned to a lower risk category.

3. Assets secured by a first mortgage on a one-to-four family residential property that are not more than 90 days past due, on nonaccrual or restructured.

4. Loans to residential real estate builders for one-to-four family residential property construction that have been presold pursuant to legally binding written sales contract.

5. Assets secured by a first mortgage on multifamily residential properties.

Category 4: 100 Percent

1. All other claims on private obligors.

2. Claims on non-OECD financial institutions with a residual maturity exceeding one year. Claims on non-OECD central banks with a residual maturity exceeding one year are included in this category unless they qualify for item 4 of Category 1.

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3. Claims on non-OECD central governments that are not included in item 4 of Category 1.

4. Obligations issued by state or local governments (including industrial development authorities and similar entities) repayable solely by a private party or enterprise.

5. Premises, plant, and equipment; other fixed assets; and other real estate owned.

6. Investments in unconsolidated subsidiaries, joint ventures, or associated companies (unless deducted from capital).

7. Capital instruments issued by other banking organizations.

8. All other assets (including claims on commercial firms owned by the public sector).

Table 2--Credit Conversion Factors for Off-Balance Sheet Items

100 Percent Conversion Factor

1. Direct credit substitutes (general guarantees of indebtedness and

guarantee-type instruments, including standby letters of credit serving as financial guarantees for, or supporting, loans and securities).

2. Risk participations in bankers acceptances and participations in direct credit substitutes (e.g., standby letters of credit).

3. Sale and repurchase agreements and asset sales with recourse, if not already included on the balance sheet.

4. Forward agreements (i.e., contractual obligations) to purchase assets, including financing facilities with certain drawdown.

50 Percent Conversion Factor

1. Transaction-related contingencies (e.g., bid bonds, performance bonds, warranties, and standby letters of credit related to particular transactions).

2. Unused portion of commitments with an original maturity exceeding one year.

3. Revolving underwriting facilities (RUFs), note issuance facilities (NIFs) and other similar arrangements.

20 Percent Conversion Factor

1. Short-term, self-liquidating trade-related contingencies, including commercial letters of credit.

Zero Percent Conversion Factor

1. Unused portion of commitments with an original maturity of one year or less.

2. Unused portion of commitments which are unconditionally cancelable at any time, regardless of maturity.

Table 3--Treatment of Derivative Contracts

1. The current exposure method is used to calculate the credit equivalent amounts of derivative contracts. These amounts are assigned a risk weight appropriate to the obligor or any collateral or guarantee. However, the maximum risk weight is limited to 50 percent. Multiple derivative contracts with a single counterparty may be netted if those contracts are subject to a qualifying bilateral netting contract.

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Conversion Factor Matrix [FN1]
[Percent]

Remaining maturity [FN2]	Interest rate	Foreign exchange rate and gold	Equity [FN2]	Precious metals	Other commodity
One year or less	0.0	1.0	6.0	7.0	10.0
Over one to five years	0.5	5.0	8.0	7.0	12.0
Over five years	1.5	7.5	10.0	8.0	15.0

FN1 For derivative contracts with multiple exchanges of principal, the

conversion factors are multiplied by the number of remaining payments in the derivative contract.

FN2 For derivative contracts that automatically reset to zero value following a payment, the remaining maturity equals the time until the next payment. However, interest rate contracts with remaining maturities of greater than one year shall be subject to a minimum conversion factor of 0.5 percent.

2. The following derivative contracts will be excluded:

a. Exchange rate contract with an original maturity of 14 calendar days or less; and

b. Derivative contract traded on exchanges and subject to daily margin requirements.

Table 4--Definition of Capital

Capital components are distributed between two categories (Tier 1 and Tier 2). Tier 2 capital elements will qualify as part of a bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital. Beginning December 31, 1992, the minimum risk-based capital standard will be 8.0%.

Definition of Capital

Tier 1:

. Common stockholders' equity;

. Noncumulative perpetual preferred stock and any related surplus; and

. Minority interests in the equity accounts of consolidated subsidiaries.

Tier 2:

. Cumulative perpetual, long-term and convertible preferred stock, and any related surplus; 5

5 The amount of long-term and intermediate-term preferred stock, as well as term subordinated debt that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of the instrument at the beginning of each of the last five years of the life of the instrument.

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. Perpetual debt and other hybrid debt/equity instruments;

. Intermediate-term preferred stock and term subordinated debt (to a maximum of 50% of Tier 1 capital); and

. Loan loss reserves (to a maximum of 1.25% of risk-weighted assets).

Deductions from Capital:

From Tier 1:

. Goodwill and other intangibles, with the exception of identified intangibles that satisfy the criteria included in the guidelines.

From Total Capital:

. Investments in unconsolidated banking and finance subsidiaries;

. Reciprocal holdings of capital instruments

Transitional Definition

During a transition period beginning December 31, 1990, all national banks are expected to maintain a capital to risk-weighted asset ratio of 7.25%, of which at least 3.25 percentage points must consist of Tier 1 capital. In other words, during this period upon to approximately 4 percentage points of the 7.25%

capital ratio may consist of Tier 2 capital. Also during this period, the sublimit on loan loss reserves will be 1.5% of risk-weighted assets.

[54 FR 4177, Jan. 27, 1989; 57 FR 40307, Sept. 3, 1992; 57 FR 44084, Sept. 24, 1992; 58 FR 16486, March 29, 1993; 59 FR 10952, 10953, March 9, 1994; 59 FR 60555, Nov. 25, 1994; 59 FR 66645, 66651, Dec. 28, 1994; 60 FR 7907, Feb. 10, 1995; 60 FR 17987, April 10, 1995; 60 FR 39229, Aug. 1, 1995; 60 FR 39493, Aug. 2, 1995; 60 FR 46174, 46176, Sept. 5, 1995; 60 FR 47458, Sept. 13, 1995; 60 FR 66044, Dec. 20, 1995]

<<PART 3
--MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES>>

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

Source: 50 FR 10216, March 14, 1985; 54 FR 4177, Jan. 27, 1989; 57 FR 40307, Sept. 3, 1992; 57 FR 44084, Sept. 24, 1992; 59 FR 60555, Nov. 25, 1994; 59 FR 64563, Dec. 15, 1994; 59 FR 66651, Dec. 28, 1994; 60 FR 17987, April 10, 1995, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER I--COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY
PART 5--RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES
SUBPART C--EXPANSION OF ACTIVITIES

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 5.33 Merger, consolidation, purchase and assumption.

(a) Authority. 12 U.S.C. 1 et seq., 24(7), 93a, 181, 214a, 215, 215a, 215c, 1815(d)(3), and 1828(c).

(b) Policy--

(1) General. It is the policy of the Office to preserve the soundness of the national banking system and promote market structures conducive to competition. A proposed merger, consolidation, or purchase of assets and assumption of liabilities between a national bank and another depository institution are all hereinafter referred to as mergers unless the context indicates otherwise. A merger which would not have a substantially adverse effect on competition and which would be beneficial to the merging depository institutions and to the public normally will be approved.

(2) Evaluative factors. In evaluating a merger application the following factors will be considered:

(i) The effect of the transaction upon competition;

(ii) The convenience and needs of the community to be served;

(iii) The financial history of the merging depository institutions;

(iv) The condition of the merging depository institutions, including capital, management and earnings prospects;

(v) The existence of insider transactions; and

(vi) The adequacy of disclosure of the terms of the merger.

(3) Competition. In order to determine the effect of a proposed merger upon competition, it is necessary to identify the relevant geographic market. The delineation of such a market can seldom be precise. Applicants have two options for delineating the relevant market.

(i) Under the first option, the applicant may use standardized market definitions specified by the Office in its Quick **Check** Merger Screen (a sample screen is included in section 20 of the Comptroller's Manual for Corporate Activities). The use of the Quick **Check** Merger Screen enables the Office to assess quickly whether the proposed merger meets the Office's standards for mergers which **clearly** have no anticompetitive effects. The Quick **Check** Merger Screen is merely a procedural device for expediting merger application processing. The OCC does not subscribe to either the market definitions or the market structure analyses that underlie the tests, except as a method which has been shown by experience to be a reliable basis for identifying mergers that **clearly** have minimal or no adverse competitive effects. Therefore, failure to meet these standards does not indicate that a merger raises competitive concerns. However, the Office generally will require additional information in applications that do not meet the standards and will perform a more in-depth competitive analysis of those applications.

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(ii) If the applicants find that the markets specified in the Office's Quick Check Merger Screen are not applicable, they may apply under the second option. Under the second option, the applicant defines the geographic market using realistic limits so that the effect of the merger upon competition can be analyzed. The applicant should define the market to encompass an area where the effect upon competition will be direct and immediate. The Office recognizes that different banking services may have different relevant geographic markets. Although the largest borrowers and depositors may find it convenient and practical to conduct part of their banking business outside the relevant geographic market, the applicant should not define the market so expansively as to cause the competitive effect of the merger to seem insignificant because only the largest customers are considered. Conversely, the applicant should not define the market so narrowly as to place competitors in different markets because only the smallest customers are considered. A fair definition of the relevant geographic market should take into account the demands of most customers for the bank's services. After the relevant geographic market has been defined, the competitive effects of the proposed merger can be analyzed. The Office will consider both the definition of the market and the intensity of competition within the market. In measuring intensity of competition, the Office will consider the number of competitors in the market (including nonbank and nonlocal competitors, where applicable), services offered, pricing of services, advertising, office hours and banking innovations.

(4) Terms. The following terms will be used to describe the competitive effects of a proposed merger:

(i) Monopoly-- means the proposed merger must be disapproved in accordance with 12 U.S.C. 1828(c)(5)(A);

(ii) Substantially adverse--means that the proposed transaction would have anticompetitive effects which preclude approval unless the anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(iii) Adverse--means that the proposed transaction would have anticompetitive effects which would be material to the decision, but which would not preclude approval; and

(iv) No significant effect--means that the anticompetitive effects of the proposed transaction, if any, would not be material to the decision.

(5) Convenience and needs. When substantially adverse competitive effects exist, they must be clearly outweighed in the public interest by the probable effects of the merger on improved convenience and needs. If not clearly outweighed, the merger will be disapproved. Convenience and needs factors which may outweigh the anticompetitive effects of a merger include:

(i) The elimination of a failing, weak or stagnating depository institution, thereby strengthening the banking system.

(ii) The achievement of economies of scale, including a better matching of sources and needs for funds, thereby providing the basis for improved customer service and bank earnings.

(iii) The extension of services not available from the merging depository institution and for which there is a clearly definable need. Such services might include a larger lending limit, specialized forms of credit, data processing, international banking, financial counseling, or fiduciary services.

The Office must also consider the record of performance in meeting the convenience and needs of the community to be served, and the application for a merger may be denied on the basis of that record. (See 12 CFR part 25)

(6) Other factors.

(i) In addition to the factors listed elsewhere in this section, the Office considers banking factors and will normally not approve a merger if it will result in a bank which has inadequate capital, unsatisfactory management or poor earnings prospects.

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(ii) It is required that all shareholders be adequately informed of all aspects of the transaction. In this regard, depository institutions are required to file with the Office proxy materials in conformance with the requirements of Securities and Exchange Commission Regulation 14A, 17 CFR 240.14a-1 up to but not including 240.14b-1, or information statements in conformance with the requirements of Securities and Exchange Commission Regulation 14C, 17 CFR 240.14c-1 up to but not including 240.14d-1. However, if a depository institution does not have an independent auditor and is not required to have an independent auditor by any provision of law or regulation other than this Section, then such depository institution need not provide audited financial statements as part of its proxy materials or information statements. Such a depository institution shall, however, provide unaudited financial statements prepared in accordance with generally accepted accounting principles (GAAP) and otherwise meeting the requirements of Regulation 14A, 17 CFR 240.14a-1 up to but not including 240.14b-1, or Regulation 14C, 17 CFR 240.14c-1 up to but not including 240.14d-1. In any transaction where securities are required to be registered with the Office under part 16 of this chapter or with the Securities and Exchange Commission under the Securities Act of 1933, a depository institution may file the registration statement with the Office to meet the requirements of this paragraph;

(7) Title. If the title of the resulting bank is not the same as any of the national banks involved in the merger, the proposed new title will be considered in accordance with the policy for title changes (see Sec. 5.42(b)).

(8) Nonconforming assets. A national bank seeking to acquire and retain nonconforming assets in a merger shall identify those assets as required by the OCC's merger application. OCC, in its discretion, may permit the bank to retain the assets for a reasonable time to allow it to dispose of or conform the assets. Retention may be subject to conditions and an OCC determination of the carrying value of the retained assets.

(c) Approval procedures and treatment of minority shareholders in consolidations and mergers.--

(1) Consolidations and mergers of national banks with other national banks and state banks as defined in 12 U.S.C. 215b(1) under the charter of a national bank. National banks entering into consolidation and merger transactions authorized pursuant to 12 U.S.C. 215 and 215a shall follow and be bound by the approval procedures and by the requirements with respect to the treatment of minority shareholders set forth in those provisions.

(2) Consolidations and mergers of national banks with Federal savings associations under charter of a national bank.--

(i) Approval of Comptroller, board and shareholders; terms and conditions; notice. Any national banking association and any Federal savings association, as authorized pursuant to title V of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 215c(a)), may, with the approval of the Office, be consolidated or merged under the charter of a national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of the national bank proposing to merge or consolidate and by the board of directors of the Federal savings association, in accordance with laws and regulations to which it is subject, and be ratified and confirmed by the affirmative vote of the shareholders of each such association

owning at least two-thirds of its capital stock outstanding, or by a different proportion of such capital stock in the case of a Federal savings association in accordance with the laws and regulations governing such association, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association is located, or, if there is no such newspaper, then in the paper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice. Notwithstanding the above, notice to the shareholders of a Federal savings association involved in a proposed consolidation or merger shall be made in accordance with the laws and regulations to which such Federal savings association is subject. Publication of notice to the shareholders of the national bank may be waived in cases where the Office determines that an emergency exists justifying such waiver, or by unanimous action of the shareholders of the association.

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(ii) Liability of resulting or receiving association; capital stock. The resulting or receiving association shall be liable for all liabilities of the respective consolidating or merging associations. The capital stock of such resulting or receiving association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and, with respect only to a merger, the merger agreement shall specify the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the Federal savings association being merged into the receiving association.

(iii) Dissenting national bank shareholders in a consolidation. If a consolidation shall be voted for at such meetings by the necessary majorities of the shareholders of each association proposing to consolidate, and the consolidation shall be approved by the Office, any shareholder of any national bank so consolidating who has voted against such consolidation at the meeting of the association of which he or she is a stockholder, or who has given notice in writing at or prior to such meeting to the presiding officer that he or she dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held when such consolidation is approved by the Office upon written request made to the resulting association at any time before thirty days after the date of consummation of the consolidation, accompanied by the surrender of his stock certificates.

(iv) Valuation of national bank shares. The value of the shares of any dissenting shareholder of any national bank shall be ascertained, as of the effective date of the consolidation, by an appraisal made by a committee of three persons, composed of: One selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; one selected by the directors of the resulting association; and one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his or her shares, appeal to the Office, who shall cause a reappraisal to be made provided that all of the parties agree that such reappraisal shall be final and binding on each party as to the value of the shares of the appellant.

(v) Appraisal of national bank shares by Comptroller; costs; sale and resale of shares. If, within ninety days from the date of consummation of the consolidation, for any reason one or more of the appraisers is not selected as

herein provided, or the appraisers fail to determine the value of such shares, the Office shall, upon written request of any interested party, cause an appraisal to be made if the parties agree that such appraisal will be final and binding on all parties as to the value of the shares of the appellant. The expenses of the Office in making the appraisal or reappraisal, as the case may be, shall be paid by the resulting association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the resulting association. Within thirty days after payment has been made to all dissenting shareholders as provided for above, the shares of stock of the resulting association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the resulting association at an advertised public auction, unless some other method of sale is approved by the Office, and the resulting association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders the excess in such sale price shall be paid to such shareholders.

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(vi) Dissenting Federal savings association shareholders. The appraisal of dissenters' shares of stock in a Federal savings association involved in a merger or consolidation with a national bank that will be the resulting or receiving association shall be determined in the manner prescribed by the law governing such association, rather than as provided in this section.

(vii) Status of receiving or resulting association; property rights and interests vested and held as fiduciary. The corporate existence of each of the consolidating or merging associations shall be continued in the resulting or receiving national banking association and such association shall be deemed to be the same corporation as each association participating in the consolidation or merger, provided that the Federal savings association shall relinquish its charter in accordance with the requirements of the Office of Thrift Supervision. All rights, franchises, and interests of the individual consolidating or merging associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the resulting or receiving national banking association by virtue of such consolidation or merger without any deed or other transfer. The resulting or receiving national banking association, upon the consolidation or merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating or merging associations at the time of consolidation or merger, subject to the conditions hereinafter provided.

(viii) Removal as fiduciary; discrimination. Where any consolidating or merging association, at the time of the consolidation, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the resulting or receiving national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such

consolidating or merging association prior to the consolidation or merger. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the resulting or receiving national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any resulting or receiving national banking association be removed solely because of the fact that it is a national banking association.

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(ix) Issuance of stock by resulting or receiving association; preemptive rights. Stock of the resulting or receiving national banking association may be issued as provided by the terms of the consolidation or merger agreement, free from any preemptive rights of the shareholders of the respective consolidating or merging associations.

(x) Definitions. For purposes of paragraph (c) of this section only, 'receiving association' means the national banking association into which one or more Federal savings associations merge; and 'resulting association' means the national banking association into which one or more Federal savings associations consolidate.

(d) Place of filing.

(1) Applications should be submitted for filing with the Director for Analysis in the appropriate district office or with the Director for Multinational and Regional Bank Supervision.

(2) Proxy material or information statements should be submitted for filing with the Director, Securities & Corporate Practices Division.

(e) Rules of General Applicability. Statutory notice requirements should be observed by applicants in lieu of those contained in Sec. 5.8(a).

(f) Investigation and examination. The Office may conduct an examination into the condition of the applicants, whether state or federally chartered, to the extent deemed necessary. The cost of such an examination, in the case of a state-chartered depository institution or a Federal savings association, shall be charged to the applicants, pursuant to Sec. 5.5(c) of this part, in addition to the filing fee imposed pursuant to Sec. 5.5 (a) and (b) of this part.

(g) Opinions. Public opinions naming the parties and containing the Office's findings are issued in all cases.

(h) Merger or consolidation of a national bank into a state-chartered bank as defined in 12 U.S.C. 214(a) or into a Federal savings association--

(1) Policy. The merger or consolidation of a national bank with a state-chartered bank or Federal savings association under the charter of the state-chartered bank or Federal savings association does not require Office approval. Additionally, the rules of general applicability (12 CFR part 5, subpart A) do not apply. Termination as a national banking association will be automatic upon completion of the requirements of 12 U.S.C. 214a, in the event of a merger or consolidation into a state-chartered bank, or paragraph (h)(3) of this section, in the event of a merger or consolidation into a Federal savings association, and consummation of the transaction.

(2) Procedure. A national bank desiring to merge or consolidate with a state bank or a Federal savings association under the charter of the state bank or Federal savings association should submit a notice to the appropriate district office advising of its intention. This notice should be submitted at the time the application to merge or consolidate is filed with the responsible agency under the Bank Merger Act (12 U.S.C. 1828(c)). The bank will be furnished with instructions to terminate its status as a national bank.

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(3) Special procedures for merger or consolidation with a Federal savings association. A national banking association may, by vote of the holders of at least two thirds of each class of its capital stock, merge or consolidate with a Federal savings association, as authorized pursuant to title V of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 215c(a)), under a Federal savings association charter, in the following manner:

(i) Approval of board of directors; publication of notice of stockholders' meeting; waiver of publication; notice by registered or certified mail. The plan of merger or consolidation must be approved by a majority of the entire board of directors of the national banking association. The bank shall publish notice of the time, place, and object of the shareholders' meeting to act upon the plan, in some newspaper with general circulation in the place where the principal office of the national banking association is located, at least once a week for four consecutive weeks, provided that newspaper publication may be dispensed with entirely if waiver by all the shareholders and one publication at least ten days before the meeting shall be sufficient if publication for four weeks is waived by holders of at least two thirds of each class of capital stock and prior written consent of the Office is obtained. The national banking association shall send such notice to each shareholder of record by registered mail or by certified mail at least ten days prior to the meeting, which notice may be waived specifically by any shareholder.

(ii) Rights of dissenting stockholders. a shareholder of a national banking association who votes against the merger or consolidation, or who has given notice in writing to the bank at or prior to such meeting that he or she dissents from the plan, shall be entitled to receive in cash the value of the shares he or she holds, if and when the merger or consolidation is consummated, upon written request made to the resulting Federal savings association at any time before thirty days after the date of consummation of such merger or consolidation, accompanied by the surrender of his or her stock certificates. The value of such shares shall be determined as of the date on which the shareholders' meeting was held authorizing the merger or consolidation, by a committee or three persons, one to be selected by majority vote of the dissenting shareholders entitled to receive the value of their shares, one by the directors of the resulting Federal savings association, and the third by the two so chosen. The valuation agreed upon by any two of three appraisers thus chosen shall govern; but, if the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment as provided herein, such shareholder may within five days after being notified of the appraised value of his or her shares appeal to the Office, which shall cause a reappraisal to be made if the parties agree that such reappraisal shall be final and binding on all parties as to the value of the shares of the appellant and also agree on how the full expenses of the Office in making the reappraisal shall be divided among the parties and paid to the Office. If, within ninety days from the date of consummation of the merger or consolidation, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Office shall upon written request of any interested party, cause an appraisal to be made provided that the parties agree that such appraisal shall be final and binding on all parties as to the value of the shares of the appellant and also agree on how the full expenses of the Office in making the appraisal shall be divided among the parties and paid to the Office. The plan of merger or consolidation shall provide, consistent with the requirements of the Office of Thrift Supervision, the manner of disposing of the shares of the resulting Federal savings association not taken by the dissenting shareholders of the national banking association.

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[45 FR 68587, Oct. 15, 1980, as amended at 46 FR 59233, Dec. 4, 1981; 50 FR 1440, Jan. 11, 1985; 51 FR 44594, Dec. 11, 1986; 53 FR 18547, May 24, 1988; 55 FR 49842, Nov. 30, 1990; 57 FR 46083, Oct. 7, 1992; 57 FR 49642, Nov. 3, 1992; 59 FR 22498, May 2, 1994; 59 FR 54796, Nov. 2, 1994]

<<PART 5--RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES>>

Authority: 12 U.S.C. 1 et seq., 93a.

Source: 45 FR 68587, Oct. 15, 1980; 50 FR 33333, Aug. 19, 1985; 55 FR 997, Jan. 11, 1990; 57 FR 58973, Dec. 14, 1992, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 204--RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS
(REGULATION D)

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 204.2 Definitions.

For purposes of this part, the following definitions apply unless otherwise specified:

(a)(1) 'Deposit' means:

(i) The unpaid balance of money or its equivalent received or held by a depository institution in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to an account, including interest credited, or which is evidenced by an instrument on which the depository institution is primarily liable;

(ii) Money received or held by a depository institution, or the credit given for money or its equivalent received or held by the depository institution in the usual course of business for a special or specific purpose, regardless of the legal relationships established thereby, including escrow funds, funds held as security for securities loaned by the depository institution, funds deposited as advance payment on subscriptions to United States government securities, and funds held to meet its acceptances;

(iii) an outstanding teller's check, or an outstanding draft, certified check, cashier's check, money order, or officer's check drawn on the depository institution, issued in the usual course of business for any purpose, including payment for services, dividends or purchases;

(iv) Any due bill or other liability or undertaking on the part of a depository institution to sell or deliver securities to, or purchase securities for the account of, any customer (including another depository institution), involving either the receipt of funds by the depository institution, regardless of the use of the proceeds, or a debit to an account of the customer before the securities are delivered. A deposit arises thereafter, if after three business days from the date of issuance of the obligation, the depository institution does not deliver the securities purchased or does not fully collateralize its obligation with securities similar to the securities purchased. A security is similar if it is of the same type and if it is of comparable maturity to that purchased by the customer;

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(v) Any liability of a depository institution's affiliate that is not a depository institution, on any promissory note, acknowledgment of advance, due bill, or similar obligation (written or oral), with a maturity of less than one and one half years, to the extent that the proceeds are used to supply or to maintain the availability of funds (other than capital) to the depository institution, except any such obligation that, had it been issued directly by the depository institution, would not constitute a deposit. If an obligation of an affiliate of a depository institution is regarded as a deposit and is used to purchase assets from the depository institution, the maturity of the deposit is

determined by the shorter of the maturity of the obligation issued or the remaining maturity of the assets purchased. If the proceeds from an affiliate's obligation are placed in the depository institution in the form of a reservable deposit, no reserves need be maintained against the obligation of the affiliate since reserves are required to be maintained against the deposit issued by the depository institution. However, the maturity of the deposit issued to the affiliate shall be the shorter of the maturity of the affiliate's obligation or the maturity of the deposit;

(vi) Credit balances;

(vii) Any liability of a depository institution on any promissory note, acknowledgment of advance, bankers' acceptance, or similar obligation (written or oral), including mortgage-backed bonds, that is issued or undertaken by a depository institution as a means of obtaining funds, except any such obligation that:

(A) Is issued or undertaken and held for the account of:

(1) An office located in the United States of another depository institution, foreign bank, Edge or Agreement Corporation, or New York Investment (Article XII) Company;

(2) The United States government or an agency thereof; or

(3) The Export-Import Bank of the United States, Minbanc Capital Corporation, the Government Development Bank for Puerto Rico, a Federal Reserve Bank, a Federal Home Loan Bank, or the National Credit Union Administration Central Liquidity Facility;

(B) Arises from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States Government or any agency thereof that the depository institution is obligated to repurchase;

(C) Is not insured by a Federal agency, is subordinated to the claims of depositors, has a weighted average maturity of five years or more, and is issued by a depository institution with the approval of, or under the rules and regulations of, its primary Federal supervisor;

(D) Arises from a borrowing by a depository institution from a dealer in securities, for one business day, of proceeds of a transfer of deposit credit in a Federal Reserve Bank or other immediately available funds (commonly referred to as 'Federal funds'), received by such dealer on the date of the loan in connection with clearance of securities transactions; or

(E) Arises from the creation, discount and subsequent sale by a depository institution of its bankers' acceptance of the type described in paragraph 7 of section 13 of the Federal Reserve Act (12 U.S.C. 372).

(viii) Any liability of a depository institution that arises from the creation after June 20, 1983, of a bankers' acceptance that is not of the type described in paragraph 7 of section 13 of the Federal Reserve Act (12 U.S.C. 372) except any such liability held for the account of an entity specified in Sec. 204.2(a)(1)(vii)(A); or

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(2) 'Deposit' does not include:

(i) Trust funds received or held by the depository institution that it keeps properly segregated as trust funds and apart from its general assets or which it deposits in another institution to the credit of itself as trustee or other fiduciary. If trust funds are deposited with the commercial department of the depository institution or otherwise mingled with its general assets, a deposit liability of the institution is created;

(ii) An obligation that represents a conditional, contingent or endorser's liability;

(iii) Obligations, the proceeds of which are not used by the depository

institution for purposes of making loans, investments, or maintaining liquid assets such as cash or 'due from' depository institutions or other similar purposes. An obligation issued for the purpose of raising funds to purchase business premises, equipment, supplies, or similar assets is not a deposit;

(iv) Accounts payable;

(v) Hypothecated 'deposits' created by payments on an installment loan where (A) the amounts received are not used immediately to reduce the unpaid balance due on the loan until the sum of the payments equals the entire amount of loan principal and interest; (B) and where such amounts are irrevocably assigned to the depository institution and cannot be reached by the borrower or creditors of the borrower;

(vi) Dealer reserve and differential accounts that arise from the financing of dealer installment accounts receivable, and which provide that the dealer may not have access to the funds in the account until the installment loans are repaid, as long as the depository institution is not actually (as distinguished from contingently) obligated to make credit or funds available to the dealer;

(vii) A dividend declared by a depository institution for the period intervening between the date of the declaration of the dividend and the date on which it is paid;

(viii) An obligation representing a 'pass through account,' as defined in this section;

(ix) An obligation arising from the retention by the depository institution of no more than a 10 per cent interest in a pool of conventional 1-4 family mortgages that are sold to third parties;

(x) An obligation issued to a State or municipal housing authority under a loan-to-lender program involving the issuance of tax exempt bonds and the subsequent lending of the proceeds to the depository institution for housing finance purposes;

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(xi) Shares of a credit union held by the National Credit Union Administration or the National Credit Union Administration Central Liquidity Facility under a statutorily authorized assistance program; and

(xii) Any liability of a United States branch or agency of a foreign bank to another United States branch or agency of the same foreign bank, or the liability of the United States office of an Edge Corporation to another United States office of the same Edge Corporation.

(b)(1) 'Demand deposit' means a deposit that is payable on demand, or a deposit issued with an original maturity or required notice period of less than seven days, or a deposit representing funds for which the depository institution does not reserve the right to require at least seven days' written notice of an intended withdrawal. Demand deposits may be in the form of:

(i) Checking accounts;

(ii) certified, cashier's, teller's, and officer's checks (including such checks issued in payment of dividends);

(iii) Traveler's checks and money orders that are primary obligations of the issuing institution;

(iv) Checks or drafts drawn by, or on behalf of, a non-United States office of a depository institution on an account maintained at any of the institution's United States offices;

(v) Letters of credit sold for cash or its equivalent;

(vi) Withheld taxes, withheld insurance and other withheld funds;

(vii) Time deposits that have matured or time deposits upon which the contractually required notice of withdrawal as given and the notice period has expired and which have not been renewed (either by action of the depositor or automatically under the terms of the deposit agreement); and

(viii) An obligation to pay, on demand or within six days, a check (or other instrument, device, or arrangement for the transfer of funds) drawn on the depository institution, where the account of the institution's customer already has been debited.

(2) The term 'demand deposit' also means deposits or accounts on which the depository institution has reserved the right to require at least seven days' written notice prior to withdrawal or transfer of any funds in the account and from which the depositor is authorized to make withdrawals or transfers in excess of the withdrawal or transfer limitations specified in paragraph (d)(2) for such an account and the account is not a NOW account, or an ATS account or other account that meets the criteria specified in either paragraph (b)(3)(ii) or (iii) of this section.

(3) 'Demand deposit' does not include:

(i) Any account that is a time deposit or a savings deposit under this part;

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(ii) Any deposit or account on which the depository institution has reserved the right to require at least seven days' written notice prior to withdrawal or transfer of any funds in the account and either--

(A) Is subject to check, draft, negotiable order of withdrawal, share draft, or similar item, such as an account authorized by 12 U.S.C. 1832(a) ('NOW account') and a savings deposit described in Sec. 204.2(d)(2), provided that the depositor is eligible to hold a NOW account; or

(B) From which the depositor is authorized to make transfers by preauthorized transfer or telephonic (including data transmission) agreement, order or instruction to another account or to a third party, provided that the depositor is eligible to hold a NOW account;

(iii) Any deposit or account on which the depository institution has reserved the right to require at least seven days' written notice prior to withdrawal or transfer of any funds in the account and from which withdrawals may be made automatically through payment to the depository institution itself or through transfer of credit to a demand deposit or other account in order to cover checks or drafts drawn upon the institution or to maintain a specified balance in, or to make periodic transfers to such other account, such as accounts authorized by 12 U.S.C. 371a (automatic transfer account or ATS account), provided that the depositor is eligible to hold an ATS account; or

(iv) IBF time deposits meeting the requirements of Sec. 204.8(a)(2).

(c)(1) 'Time deposit' means:

(i) A deposit that the depositor does not have a right and is not permitted to make withdrawals from within six days after the date of deposit unless the deposit is subject to an early withdrawal penalty of at least seven days' simple interest on amounts withdrawn within the first six days after deposit.1 A time deposit from which partial early withdrawals are permitted must impose additional early withdrawal penalties of at least seven days' simple interest on amounts withdrawn within six days after each partial withdrawal. If such additional early withdrawal penalties are not imposed, the account ceases to be a time deposit. The account may become a savings deposit if it meets the requirements for a saving deposit; otherwise it becomes a transaction account.2 'Time deposit' includes funds--

1 A time deposit, or a portion thereof, may be paid before maturity without imposing the early withdrawal penalties specified by this part:

(a) Where the time deposit is maintained in an individual retirement account established in accordance with 26 U.S.C. 408 and is paid within

instruments. For long-term preferred stock, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of the instrument (net of redemptions) at the beginning of each of the last five years of the life of the instrument;

(3) Hybrid capital instruments, without limit. Hybrid capital instruments are those instruments that combine certain characteristics of debt and equity, such as perpetual debt. To be included as Tier 2 capital, these instruments must meet the following criteria: 4

4 Mandatory convertible debt instruments that meet the requirements of 12 CFR 3.100(e)(5), or that have been previously approved as capital by the OCC, are treated as qualifying hybrid capital instruments.

(i) The instrument must be unsecured, subordinated to the claims of depositors and general creditors, and fully paid-up;

(ii) The instrument must not be redeemable at the option of the holder prior to maturity, except with the prior approval of the OCC;

(iii) The instrument must be available to participate in losses while the issuer is operating as a going concern (in this regard, the instrument must automatically convert to common stock or perpetual preferred stock, if the sum of the retained earnings and capital surplus accounts of the issuer shows a negative balance); and

(iv) The instrument must provide the option for the issuer to defer principal and interest payments, if

(A) The issuer does not report a net profit for the most recent combined four quarters, and

(B) The issuer eliminates cash dividends on its common and preferred stock.

(4) Term subordinated debt instruments, and intermediate-term preferred stock and related surplus are included in Tier 2 capital, but only to a maximum of 50% of Tier 1 capital as calculated after deductions pursuant to section 2(c) of this appendix. To be considered capital, term subordinated debt instruments must meet the requirements of 12 CFR 3.100(f)(1). Also, at the beginning of each of the last five years of the life of either type of instrument, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of that instrument (net of redemptions). 5

5 Capital instruments may be redeemed prior to maturity with the prior approval of the OCC. The OCC typically will consider requests for the redemption of capital instruments when the instruments are to be redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument. However, the OCC may deny redemption in such circumstances or allow redemption in other circumstances, based upon its evaluation of the circumstances of each case. The OCC must be notified in writing of any request for redemption at least 30 days in advance of such redemption pursuant to the procedures in Sec. 5.46 of this chapter.

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6 [Reserved].

(c) Deductions From Capital. The following items are deducted from the appropriate portion of a national bank's capital base when calculating its risk-based capital ratio:

(1) Deductions from Tier 1 capital. The following items are deducted from Tier 1 capital before the Tier 2 portion of the calculation is made:

(i) All goodwill subject to the transition rules contained in section 4(a)(1)(ii) of this appendix A;

(ii) Other intangible assets, except as provided in section 2(c)(2) of this appendix A; and

(iii) Deferred tax assets, except as provided in section 2(c)(3) of this appendix A, that are dependent upon future taxable income, which exceed the lesser of either:

(A) The amount of deferred tax assets that the bank could reasonably expect to realize within one year of the quarter-end Call Report, based on its estimate of future taxable income for that year; or

(B) 10% of Tier 1 capital, net of goodwill and all intangible assets other than mortgage servicing rights and purchased credit card relationships, and before any disallowed deferred tax assets are deducted.

(2) Qualifying intangible assets. Subject to the following conditions, mortgage servicing rights (originated and purchased) and purchased credit card relationships need not be deducted from Tier 1 capital:

(i) The total of all intangible assets which are included in Tier 1 capital is limited to 50 percent of Tier 1 capital, of which no more than 25 percent of Tier 1 capital can consist of purchased credit card relationships. Calculation of these limitations must be based on Tier 1 capital net of goodwill and other disallowed intangible assets.

(ii) Each intangible asset which is included in Tier 1 capital must be valued at the lesser of:

(A) 90 percent of the fair market value of the intangible asset, determined in accordance with section 2(c)(2)(iii) of this appendix A; or

(B) 100 percent of the remaining unamortized book value of the intangible asset, determined at least quarterly in accordance with the instructions of the Call Report.

(iii) Banks shall determine the current fair market value of each intangible asset included in Tier 1 capital at least quarterly. The quarterly determination of the current fair market value of the intangible asset must include adjustments for any significant changes in original valuation assumptions, including changes in prepayment estimates. In determining the current fair market value of the intangible asset, the bank shall apply an appropriate market discount rate to the expected net cash flows of the intangible asset.

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(3) Deferred tax assets--(i) Net unrealized gains and losses on available-for-sale securities. Before calculating the amount of deferred tax assets subject to the limit in section 2(c)(1)(iii) of this appendix A, a bank may eliminate the deferred tax effects of any net unrealized holding gains and losses on available-for-sale debt securities. Banks report these net unrealized holding gains and losses in their Call Reports as a separate component of equity capital, but exclude them from the definition of common stockholders' equity for regulatory capital purposes. A bank that adopts a policy to deduct these amounts must apply that approach consistently in all future calculations of the amount of disallowed deferred tax assets under section 2(c)(1)(iii) of this appendix A.

(ii) Consolidated groups. The amount of deferred tax assets that a bank can realize from taxes paid in prior carryback years and from reversals of existing taxable temporary differences generally would not be deducted from capital. However, for a bank that is a member of a consolidated group (for tax purposes),

the amount of carryback potential a bank may consider in calculating the limit on deferred tax assets under section 2(c)(1)(iii) of this appendix A, may not exceed the amount that the bank could reasonably expect to have refunded by its parent holding company.

(iii) Nontaxable Purchase Business Combination. In calculating the amount of net deferred tax assets under section 2(c)(1)(iii) of this appendix A, a deferred tax liability that is specifically associated with an intangible asset (other than purchased mortgage servicing rights and purchased credit card relationships) due to a nontaxable purchase business combination may be netted against that intangible asset. Only the net amount of the intangible asset must be deducted from Tier 1 capital. Deferred tax liabilities netted in this manner cannot also be netted against deferred tax assets when determining the amount of net deferred tax assets that are dependent upon future taxable income.

(iv) Estimated future taxable income. Estimated future taxable income does not include net operating loss carryforwards to be used during that year or the amount of existing temporary differences expected to reverse within the year. A bank may use future taxable income projections for their closest fiscal year, provided it adjusts the projections for any significant changes that occur or that it expects to occur. Such projections must include the estimated effect of tax planning strategies that the bank expects to implement to realize net operating losses or tax credit carryforwards that will otherwise expire during the year.

(4) Deductions from total capital. The following items are deducted from total capital:

(i) Investments, both equity and debt, in unconsolidated banking and finance subsidiaries that are deemed to be capital of the subsidiary;7 and

7 The OCC may require deduction of investments in other subsidiaries and associated companies, on a case-by-case basis.

(ii) Reciprocal holdings of bank capital instruments.

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

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The denominator of the risk-based capital ratio, i.e., a national bank's risk-weighted assets,8 is derived by assigning that bank's assets and off-balance sheet items to one of the four risk categories detailed in section 3(a) of this Appendix A. Each category has a specific risk weight. Before an off-balance sheet item is assigned a risk weight, it is converted to an on-balance sheet credit equivalent amount in accordance with section 3(b) of this Appendix A. The risk weight assigned to a particular asset or on-balance sheet credit equivalent amount determines the percentage of that asset/credit equivalent that is included in the denominator of the bank's risk-based capital ratio. Any asset deducted from a bank's capital in computing the numerator of the risk-based capital ratio is not included as part of the bank's risk-weighted assets.

8 The OCC reserves the right to require a bank to compute its risk-based capital ratio on the basis of average, rather than period-end, risk-weighted assets when necessary to carry out the purposes of these

guidelines.

Some of the assets on a bank's balance sheet may represent an indirect holding of a pool of assets, e.g., mutual funds, that encompasses more than one risk weight within the pool. In those situations, the asset is assigned to the risk category applicable to the highest risk-weighted asset that pool is permitted to hold pursuant to its stated investment objectives. However, the minimum risk weight that may be assigned to such a pool is 20%. If, in order to maintain a necessary degree of liquidity, the fund is permitted to hold an insignificant amount of its investments in short-term, highly-liquid securities of superior credit quality (that do not qualify for a preferential risk weight), such securities generally will not be taken into account in determining the risk category into which the bank's holding in the overall pool should be assigned. More detail on the treatment of mortgage-backed securities is provided in section 3(a)(3)(vi) of this appendix A.

(a) On-Balance Sheet Assets. The following are the risk categories/weights for on-balance sheet assets.

(1) Zero percent risk weight. (i) Cash, including domestic and foreign currency owned and held in all offices of a national bank or in transit. Any foreign currency held by a national bank should be converted into U.S. dollar equivalents.

(ii) Deposit reserves and other balances at Federal Reserve Banks.

(iii) Securities issued by, and other direct claims on, the United States Government or its agencies, or the central government of an OECD country.

(iv) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.9

9 For the treatment of privately-issued mortgage-backed securities where the underlying pool is comprised solely of mortgage-related securities issued by GNMA, see infra note 10.

(v) That portion of local currency claims on or unconditionally guaranteed by central governments of non-OECD countries, to the extent the bank has local currency liabilities in that country. Any amount of such claims that exceeds the amount of the bank's local currency liabilities is assigned to the 100% risk category of section 3(a)(4) of this appendix.

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(vi) Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.

(vii) The book value of paid-in Federal Reserve Bank stock.

(viii) That portion of assets and off-balance sheet transactions9a collateralized by cash or securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, provided that:9b

9a See footnote 22 in section 3(b)(5)(iii) of this appendix A (collateral held against derivative contracts).

9b Assets and off-balance sheet transactions collateralized by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country include, but are not limited to,

securities lending transactions, repurchase agreements, collateralized letters of credit, such as reinsurance letters of credit, and other similar financial guarantees. Swaps, forwards, futures, and options transactions are also eligible, if they meet the collateral requirements. However, the OCC may at its discretion require that certain collateralized transactions be risk weighted at 20 percent if they involve more than a minimal risk.

(A) The bank maintains control over the collateral:

(1) If the collateral consists of cash, the cash must be held on deposit by the bank or by a third-party for the account of the bank;

(2) If the collateral consists of OECD government securities, then the OECD government securities must be held by the bank or by a third-party acting on behalf of the bank;

(B) The bank maintains a daily positive margin of collateral fully taking into account any change in the market value of the collateral held as security;

(C) Where the bank is acting as a customer's agent in a transaction involving the loan or sale of securities that is collateralized by cash or OECD government securities delivered to the bank, any obligation by the bank to indemnify the customer is limited to no more than the difference between the market value of the securities lent and the market value of the collateral received, and any reinvestment risk associated with the collateral is borne by the customer; and

(D) The transaction involves no more than minimal risk.

(2) 20 percent risk weight. (i) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category, but are assigned to the 100% risk category of section 3(a)(4) of this appendix A.

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(ii) Claims on, or guaranteed by depository institutions, other than the central bank, incorporated in a non-OECD country, with a residual maturity of one year or less.

(iii) Cash items in the process of collection.

(iv) That portion of assets collateralized by cash or by securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, that does not qualify for the zero percent risk-weight category.

(v) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.

(vi) Securities issued by, or other direct claims on, United States Government-sponsored agencies.

(vii) That portion of assets guaranteed by United States Government-sponsored agencies.10

10 Privately issued mortgage-backed securities, e.g., CMOs and REMICs, where

the underlying pool is comprised solely of mortgage-related securities issued by GNMA, FNMA and FHLMC, will be treated as an indirect holding of the underlying assets and assigned to the 20% risk category of this section 3(a)(2). If the underlying pool is comprised of assets which attract different risk weights, e.g., FNMA securities and conventional mortgages, the bank should generally assign the security to the highest risk category appropriate for any asset in the pool. However, on a case-by-case basis, the OCC may allow the bank to assign the security proportionately to the various risk categories based on the proportion in which the risk categories are represented by the composition cash flows of the underlying pool of assets. Before the OCC will consider a request to proportionately risk-weight such a security, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of assets. Furthermore, before a mortgage-related security will receive a risk weight lower than 100%, it must meet the criteria set forth in section 3(a)(3)(vi) of this appendix A.

(viii) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies.

(ix) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity. In the U.S., these obligations must meet the requirements of 12 CFR 1.3(g).

(x) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.11

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11 These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

(xi) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.

(xii) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the bank has local currency liabilities in that country. Any amount of such claims that exceeds the amount of the bank's local currency liabilities is assigned to the 100% risk category of section 3(a)(4) of this appendix.

(3) 50 percent risk weight. (i) Revenue obligations of any public-sector entity in an OECD country for which the underlying obligor is the public-sector entity, but which are repayable solely from the revenues generated by the project financed through the issuance of the obligations.

(ii) The credit equivalent amount of derivative contracts, calculated in accordance with section 3(b)(5) of this Appendix A, that do not qualify for inclusion in a lower risk category.

(iii) Loans secured by first mortgages on one-to-four family residential properties, either owner-occupied or rented, provided that such loans are not

otherwise 90 days or more past due, or on nonaccrual or restructured. It is presumed that such loans will meet prudent underwriting standards. Furthermore, residential property loans that are made for the purpose of construction financing are assigned to the 100% risk category of section 3(a)(4) of this Appendix A; however, this exclusion from the 50% risk category does not apply to loans to individual purchasers for the construction of their own homes.

(iv) Loans to residential real estate builders for one-to-four family residential property construction, if the bank obtains, prior to the making of the construction loan, sufficient documentation demonstrating that the buyer of the home intends to purchase the home (i.e., a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (i.e., a firm written commitment for permanent financing of the home upon completion), subject to the following additional criteria:

(A) The builder must incur at least the first 10% of the direct costs (i.e., actual costs of the land, labor, and material) before any drawdown is made under the construction loan and the construction loan may not exceed 80% of the sales price of the resold home;

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(B) The individual purchaser has made a substantial 'earnest money deposit' of no less than 3% of the sales price of the home that must be subject to forfeiture by the individual purchaser if the sales contract is terminated by the individual purchaser; however, the earnest money deposit shall not be subject to forfeiture by reason of breach or termination of the sales contract on the part of the builder;

(C) The earnest money deposit must be held in escrow by the bank financing the builder or by an independent party in a fiduciary capacity; the escrow agreement must provide that in the event of default the escrow funds must be used to defray any cost incurred relating to any cancellation of the sales contract by the buyer;

(D) If the individual purchaser terminates the contract or if the loan fails to satisfy any other criterion under this section, then the bank must immediately recategorize the loan at a 100% risk weight and must accurately report the loan in the bank's next quarterly Consolidated Reports of Condition and Income (Call Report);

(E) The individual purchaser must intend that the home will be owner-occupied;

(F) The loan is made by the bank in accordance with prudent underwriting standards;

(G) The loan is not more than 90 days past due, or on nonaccrual; and

(H) The purchaser is an individual(s) and not a partnership, joint venture, trust, corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing one or more of the homes for speculative purposes.

(v) Loans secured by a first mortgage on multifamily residential properties :11a

11a The portion of multifamily residential property loans that is sold subject to a pro rata loss sharing arrangement may be treated by the selling bank as sold to the extent that the sales agreement provides for the purchaser of the loan to share in any loss incurred on the loan on a pro rata basis with the selling bank. The portion of multifamily residential property loans sold subject to any loss sharing arrangement other than pro rata sharing of the loss shall be accorded the same

treatment as any other asset sold under an agreement to repurchase or sold with recourse under section 3(b)(1)(iii) (footnote 14) of this appendix A.

(A) The amortization of principal and interest occurs in not more than 30 years;

(B) The minimum original maturity for repayment of principal is not less than 7 years;

(C) All principal and interest payments have been made on a timely basis in accordance with the terms of the loan for at least one year immediately preceding the risk weighting of the loan in the 50% risk weight category, and the loan is not otherwise 90 days or more past due, or on nonaccrual status;

(D) The loan is made in accordance with all applicable requirements and prudent underwriting standards;

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(E) If the rate of interest does not change over the term of the loan:

(I) The current loan amount outstanding does not exceed 80% of the current value of the property, as measured by either the value of the property at origination of the loan (which is the lower of the purchase price or the value as determined by the initial appraisal, or if appropriate, the initial evaluation) or the most current appraisal, or if appropriate, the most current evaluation; and

(II) In the most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120%;11b

11b For the purposes of the debt service requirements in sections 3(a)(3)(v)(E)(II) and 3(a)(3)(v)(F)(II) of this appendix A, other forms of debt service coverage that generate sufficient cash flows to provide comparable protection to the institution may be considered for (a) a loan secured by cooperative housing or (b) a multifamily residential property loan if the purpose of the loan is for the development or purchase of multifamily residential property primarily intended to provide low- to moderate-income housing, including special operating reserve accounts or special operating subsidies provided by federal, state, local or private sources. However, the OCC reserves the right, on a case-by-case basis, to review the adequacy of any other forms of comparable debt service coverage relied on by the bank.

(F) If the rate of interest changes over the term of the loan:

(I) The current loan amount outstanding does not exceed 75% of the current value of the property, as measured by either the value of the property at origination of the loan (which is the lower of the purchase price or the value as determined by the initial appraisal, or if appropriate, the initial evaluation) or the most current appraisal, or if appropriate, the most current evaluation; and

(II) In the most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115%; and

(G) If the loan was refinanced by the borrower:

(I) All principal and interest payments on the loan being refinanced which were made in the preceding year prior to refinancing shall apply in determining the one-year timely payment requirement under paragraph (a)(3)(v)(C) of this section; and

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(II) The net operating income generated by the property in the preceding year prior to refinancing shall apply in determining the applicable debt service requirements under paragraphs (a)(3)(v)(E) and (a)(3)(v)(F) of this section.

(vi) Privately-issued mortgage-backed securities, i.e. those that do not carry the guarantee of a government or government-sponsored agency, if the privately-issued mortgage-backed securities are at the time the mortgage-backed securities are originated fully secured by or otherwise represent a sufficiently secure interest in mortgages that qualify for the 50% risk weight under paragraphs (a)(3) (iii), (iv) and (v) of this section,12 provided that they meet the following criteria:

12 If all of the underlying mortgages in the pool do not qualify for the 50% risk weight, the bank should generally assign the entire value of the security to the 100% risk category of section 3(a)(4) of this Appendix A; however, on a case-by-case basis, the OCC may allow the bank to assign only the portion of the security which represents an interest in, and the cash flows of, nonqualifying mortgages to the 100% risk category, with the remainder being assigned a risk weight of 50%. Before the OCC will consider a request to risk weight a mortgage-backed security on a proportionate basis, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of mortgages.

(A) The underlying assets must be held by an independent trustee that has a first priority, perfected security interest in the underlying assets for the benefit of the holders of the security;

(B) The holder of the security must have an undivided pro rata ownership interest in the underlying assets or the trust that issues the security must have no liabilities unrelated to the issued securities;

(C) The trust that issues the security must be structured such that the cash flows from the underlying assets fully meet the cash flows requirements of the security without undue reliance on any reinvestment income; and

(D) There must not be any material reinvestment risk associated with any funds awaiting distribution to the holder of the security.

(4) 100 percent risk weight. All other assets not specified above, including, but not limited to:

(i) Claims on or guaranteed by depository institutions incorporated in a non-OECD country, as well as claims on the central bank of a non-OECD country, with a residual maturity exceeding one year.

(ii) All non-local currency claims on non-OECD central governments, as well as local currency claims on non-OECD central governments that are not included in section 3(a)(1)(v) of this appendix A.

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(iii) Any classes of a mortgage-backed security that can absorb more than their pro rata share of the principal loss without the whole issue being in default, e.g., subordinated classes or residual interests, regardless of the issuer or guarantor.

(iv) All stripped mortgage-backed securities, including interest only portions (IOs), principal only portions (POs) and other similar instruments, regardless of the issuer or guarantor.

(v) Obligations issued by any state or any political subdivision thereof for

the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligation, e.g., industrial development bonds.

(vi) Claims on commercial enterprises owned by non-OECD and OECD central governments.

(vii) Any investment in an unconsolidated subsidiary that is not required to be deducted from total capital pursuant to section 2(c)(3) of this appendix A.

(viii) Instruments issued by depository institutions incorporated in OECD and non-OECD countries that qualify as capital of the issuer.

(ix) Investments in fixed assets, premises, and other real estate owned.

(b) Off-Balance Sheet Activities. The risk weight assigned to an off-balance sheet item is determined by a two-step process. First, the face amount of the off-balance sheet item is multiplied by the appropriate credit conversion factor specified in this section. This calculation translates the face amount of an off-balance sheet item into an on-balance sheet credit equivalent amount. Second, the resulting credit equivalent amount is then assigned to the proper risk category using the criteria regarding obligors, guarantors, and collateral listed in section 3(a) of this appendix A. Collateral and guarantees are applied to the face amount of an off-balance sheet item; however, with respect to derivative contracts under section 3(b)(5) of this appendix A, collateral and guarantees are applied to the credit equivalent amounts of such derivative contracts. The following are the credit conversion factors and the off-balance sheet items to which they apply.

(1) 100 percent credit conversion factor. (i) Direct credit substitutes, including financial guarantee-type standby letters of credit that support financial claims on the account party.13 The face amount of a direct credit substitute is netted against the amount of any participations sold in that item. The amount not sold is converted to an on-balance sheet credit equivalent and assigned to the proper risk category using the criteria regarding obligors, guarantors and collateral listed in section 3(a) of this appendix A. Participations are treated as follows:

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13 For purposes of this section 3(b)(1)(i), a 'financial guarantee-type standby letter of credit' is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party or (2) to make payment on account of any indebtedness undertaken by the account party, in the event that the account party fails to fulfill its obligation to the beneficiary. Performance-based standby letters of credit are defined differently in section 3(b)(2)(i), infra note 16.

(A) If the originating bank remains liable to the beneficiary for the full amount of the standby letter of credit, in the event the participant fails to perform under its participation agreement, the amount of participations sold are converted to an on-balance sheet credit equivalent using a credit conversion factor of 100%, with that amount then being assigned to the risk category appropriate for the purchaser of the participation.

(B) If the participations are such that each participant is responsible only for its pro rata share of the risk, and there is no recourse to the originating bank, the full amount of the participations sold is excluded from the

originating bank's risk-weighted assets;

(ii) Risk participations purchased in bankers' acceptances and participations purchased in direct credit substitutes;

(iii) Assets sold under an agreement to repurchase and assets sold with recourse,14 to the extent that these assets are not reported on a national bank's statement of condition (this includes loan strips sold without direct recourse, where the maturity of the participation is shorter than the maturity of the underlying loan); and

14 For risk-based capital purposes, the definition of the sale of assets with recourse, including one-to-four family residential mortgages, is generally the same as the definition contained in the Instructions for the Preparation of the Consolidated Reports of Condition and Income (the Call Report). Assets sold in transactions in which the bank retains risk in a manner constituting recourse under the Call Report instructions, but which are not reported on the bank's statement of condition, are included in section 3(b)(1)(iii), even though the Call Report allows such transfers to be reported as sales. However, mortgage loans sold in transactions in which the bank retains only an insignificant amount of risk and makes concurrent provision for that risk are not considered assets sold with recourse under section 3. In order to qualify for sales treatment, such transactions must meet three conditions: (1) The bank has not retained any significant risk of loss, either directly or indirectly; (2) The bank's maximum contractual exposure under the recourse provision (or through the retention of a subordinated interest in the mortgages) at the time of the transfer is equal to or less than the amount of probable loss that the bank has reasonably estimated that it will incur on the transferred mortgages; and (3) The bank must have created a liability account or other special reserve in an amount equal to its maximum exposure. The amount of this liability account or other special reserve may not be included in capital for the purpose of determining compliance with either the risk-based capital requirement or the leverage ratio; nor may it be included in the allowance for loan and lease losses.

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(iv) Contingent obligations with a certain draw down, e.g., legally binding agreements to purchase assets as a specified future date.

(v) Indemnification of customers whose securities the bank has lent as agent. If the customer is not indemnified against loss by the bank, the transaction is excluded from the risk-based capital calculation.15

15 When a bank lends its own securities, the transaction is treated as a loan. When a bank lends its own securities or, acting as agent, agrees to indemnify a customer, the transaction is assigned to the risk weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf.

(2) 50 percent credit conversion factor. (i) Transaction-related contingencies including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction.16 To the extent permitted by law or regulation, performance-based

standby letters of credit include such things as arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids;

16 For purposes of this section 3(b)(2)(i), a 'performance-based standby letter of credit' is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by the account party in the performance of a nonfinancial or commercial obligation. Participations in performance-based standby letters of credit are treated in accordance with the provisions of section 3(b)(1)(i)(A)&(B) of this appendix A. Financial guarantee-type standby letters of credit are defined in section 3(b)(1)(i), supra note 13.

(ii) Unused portion of commitments, including home equity lines of credit, with an original maturity exceeding one year; 17 and

17 Participations in commitments are treated in accordance with the provisions of section 3(b)(1)(i)(A)&(B) of this appendix A. Until December 31, 1992, national banks will be permitted to use remaining maturity in determining the appropriate credit conversion factor for the unused portion of loan commitments.

(iii) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the bank's customer can issue short-term debt obligations in its own name, but for which the bank has a legally binding commitment to either:

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(A) Purchase the obligations the customer is unable to sell by a stated date; or

(B) Advance funds to its customer, if the obligations cannot be sold.

(3) 20 percent credit conversion factor. (i) Trade-related contingencies. These are short-term self-liquidating instruments used to finance the movement of goods and are collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(4) Zero percent credit conversion factor.

(i) Unused portion of commitments with an original maturing of one year or less;

(ii) Unused portion of commitments with an original maturity of greater than one year, if they are unconditionally cancelable 18 at any time at the option of the bank and the bank has the contractual right to make, and in fact does make, either--

18 See section 1(c)(26) of appendix A to this part.

(A) A separate credit decision based upon the borrower's current financial condition, before each drawing under the lending facility; or

(B) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(iii) The unused portion of retail credit card lines or other related plans

that are unconditionally cancelable by the bank in accordance with applicable law.

(5) Derivative contracts. (i) Calculation of credit equivalent amounts. The credit equivalent amount of a derivative contract equals the sum of the current credit exposure and the potential future credit exposure of the derivative contract. The calculation of credit equivalent amounts must be measured in U.S. dollars, regardless of the currency or currencies specified in the derivative contract.

(A) Current credit exposure. The current credit exposure for a single derivative contract is determined by the mark-to-market value of the derivative contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market is zero or negative, then the current credit exposure is zero. The current credit exposure for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract is determined as provided by section 3(b)(5)(ii)(A) of this appendix A.

(B) Potential future credit exposure. The potential future credit exposure for a single derivative contract, including a derivative contract with negative mark-to-market value, is calculated by multiplying the notional principal19 of the derivative contract by one of the credit conversion factors in Table A--Conversion Factor Matrix of this appendix A, for the appropriate category.20 The potential future credit exposure for gold contracts shall be calculated using the foreign exchange rate conversion factors. For any derivative contract that does not fall within one of the specified categories in Table A--Conversion Factor Matrix of this appendix A, the potential future credit exposure shall be calculated using the other commodity conversion factors. Subject to examiner review, banks should use the effective rather than the apparent or stated notional amount in calculating the potential future credit exposure. The potential future credit exposure for multiple derivatives contracts executed with a single counterparty and subject to a qualifying bilateral netting contract is determined as provided by section 3(b)(5)(ii)(A) of this appendix A.

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19 For purposes of calculating either the potential future credit exposure under section 3(b)(5)(i)(B) of this appendix A or the gross potential future credit exposure under section 3(b)(5)(ii)(A)(2) of this appendix A for foreign exchange contracts and other similar contracts in which the notional principal is equivalent to the cash flows, total notional principal is the net receipts to each party falling due on each value date in each currency.

20 No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

Table A--Conversion Factor Matrix [FN1]

Remaining maturity [FN2]	Interest rate	Foreign exchange rate and gold	Equity [FN2]	Precious metals	Other commodity

One year or less	0.0	1.0	6.0	7.0	10.0
Over one to five years	0.5	5.0	8.0	7.0	12.0
Over five years	1.5	7.5	10.0	8.0	15.0

FN1 For derivative contracts with multiple exchanges of principal, the conversion factors are multiplied by the number of remaining payments in the derivative contract.

FN2 For derivative contracts that automatically reset to zero value following a payment, the remaining maturity equals the time until the next payment. However, interest rate contracts with remaining maturities of greater than one year shall be subject to a minimum conversion factor of 0.5 percent.

(ii) Derivative contracts subject to a qualifying bilateral netting contract.

(A) Netting calculation. The credit equivalent amount for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract as provided by section (3)(b)(5)(ii)(B) of this appendix A is calculated by adding the net current credit exposure and the adjusted sum of the potential future credit exposure for all derivative contracts subject to the qualifying bilateral netting contract.

(1) Net current credit exposure. The net current credit exposure is the net sum of all positive and negative mark-to-market values of the individual derivative contracts subject to a qualifying bilateral netting contract. If the net sum of the mark-to-market value is positive, then the net current credit exposure equals that net sum of the mark-to-market value. If the net sum of the mark-to-market value is zero or negative, then the net current credit exposure is zero.

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(2) Adjusted sum of the potential future credit exposure. The adjusted sum of the potential future credit exposure is calculated as:

A subnet =0.4XA subgross +(0.6XNGRXA subgross)

A subnet is the adjusted sum of the potential future credit exposure, A subgross is the gross potential future credit exposure, and NGR is the net to gross ratio. A subgross is the sum of the potential future credit exposure (as determined under section 3(b)(5)(i)(B) of this appendix A) for each individual derivative contract subject to the qualifying bilateral netting contract. The NGR is the ratio of the net current credit exposure to the gross current credit exposure. In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under section 3(b)(5)(i)(A) of this appendix A) of all individual derivative contracts subject to the qualifying bilateral netting contract.

(B) Qualifying bilateral netting contract. In determining the current credit exposure for multiple derivative contracts executed with a single counterparty, a bank may net derivative contracts subject to a qualifying bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(1) The qualifying bilateral netting contract is in writing.

(2) The qualifying bilateral netting contract is not subject to a walkaway clause.

(3) The qualifying bilateral netting contract creates a single legal obligation for all individual derivative contracts covered by the qualifying bilateral netting contract. In effect, the qualifying bilateral netting

contract must provide that the bank would have a single claim or obligation either to receive or to pay only the net amount of the sum of the positive and negative mark-to-market values on the individual derivative contracts covered by the qualifying bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the qualifying bilateral netting contract has been assigned, fails to perform due to any of the following events: default, insolvency, bankruptcy, or other similar circumstances.

(4) The bank obtains a written and reasoned legal opinion(s) that represents, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy, or similar circumstances, the relevant court and administrative authorities would find the bank's exposure to be the net amount under:

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(i) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(ii) The law of the jurisdiction that governs the individual derivative contracts covered by the bilateral netting contract; and

(iii) The law of the jurisdiction that governs the qualifying bilateral netting contract.

(5) The bank establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the qualifying bilateral netting contract continues to satisfy the requirement of this section.

(6) The bank maintains in its files documentation adequate to support the netting of a derivative contract.21

21 By netting individual derivative contracts for the purpose of calculating its credit equivalent amount, a bank represents that documentation adequate to support the netting of a set of derivative contract is in the bank's files and available for inspection by the OCC. Upon determination by the OCC that a bank's files are inadequate or that a qualifying bilateral netting contract may not be legally enforceable in any one of the bodies of law described in section 3(b)(5)(ii)(B)(3)(i) through (iii) of this appendix A, the underlying derivative contracts may not be netted for the purposes of this section.

(iii) Risk weighting. Once the bank determines the credit equivalent amount for a derivative contract or a set of derivative contracts subject to a qualifying bilateral netting contract, the bank assigns that amount to the risk weight category appropriate to the counterparty, or, if relevant, the nature of any collateral or guarantee.22 However, the maximum weight that will be applied to the credit equivalent amount of such derivative contract(s) is 50 percent.

22 Derivative contracts are an exception to the general rule of applying collateral and guarantees to the face value of off-balance sheet items. The sufficiency of collateral and guarantees is determined on the basis of the credit equivalent amount of derivative contracts. However, collateral and guarantees held against a qualifying bilateral netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the qualifying bilateral netting contract.

(iv) Exceptions. The following derivative contracts are not subject to the above calculation, and therefore, are not part of the denominator of a national bank's risk-based capital ratio:

(A) An exchange rate contract with an original maturity of 14 calendar days or less;23 and

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23 Notwithstanding section 3(b)(5)(B) of this appendix A, gold contracts do not qualify for this exception.

(B) A derivative contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(c) Alternative Capital Calculation for Small Business Obligations. (1) Definitions. For purposes of this section 3(c):

(i) Qualified bank means a bank that:

(A) Is well capitalized as defined in 12 CFR 6.4 without applying the capital treatment described in this section 3(c), or

(B) Is adequately capitalized as defined in 12 CFR 6.4 without applying the capital treatment described in this section 3(c) and has received written permission from the appropriate district office of the OCC to apply the capital treatment described in this section 3(c).

(ii) Recourse has the meaning given to such term under generally accepted accounting principles.

(iii) Small business means a business that meets the criteria for a small business concern established by the Small Business Administration in 13 CFR part 121 pursuant to 15 U.S.C. 632.

(2) Capital and reserve requirements. With respect to a transfer of a small business loan or a lease of personal property with recourse that is a sale under generally accepted accounting principles, a qualified bank may elect to apply the following treatment:

(i) The bank establishes and maintains a non-capital reserve under generally accepted accounting principles sufficient to meet the reasonable estimated liability of the bank under the recourse arrangement;

(ii) For purposes of calculating the bank's risk-based capital ratio, the bank includes only the amount of its retained recourse in its risk-weighted assets; and

(iii) For purposes of calculating the bank's tier 1 leverage ratio, the bank excludes from its average total consolidated assets the outstanding principal amount of the small business loans and leases transferred with recourse.

(3) Limit on aggregate amount of recourse. The total outstanding amount of recourse retained by a qualified bank with respect to transfers of small business loans and leases of personal property and included in the risk-weighted assets of the bank as described in section 3(c)(2) of this appendix A may not exceed 15 percent of the bank's total capital after adjustments and deductions, unless the OCC specifies a greater amount by order.

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(4) Bank that ceases to be qualified or that exceeds aggregate limit. If a bank ceases to be a qualified bank or exceeds the aggregate limit in section 3(c)(3) of this appendix A, the bank may continue to apply the capital treatment described in section 3(c)(2) of this appendix A to transfers of small business loans and leases of personal property that occurred when the bank was qualified

and did not exceed the limit.

(5) Prompt Corrective Action not affected. (i) A bank shall compute its capital without regard to this section 3(c) for purposes of prompt corrective action (12 U.S.C. 1831o and 12 CFR part 6) unless the bank is an adequately or well capitalized bank (without applying the capital treatment described in this section 3(c)) and, after applying the capital treatment described in this section 3(c), the bank would be well capitalized.

(ii) A bank shall compute its capital without regard to this section 3(c) for purposes of 12 U.S.C. 1831o(g) regardless of the bank's capital level.

(d) Recourse Obligations. Where the amount of recourse liability retained by a bank is less than the capital requirement for credit-risk exposure, the bank shall maintain capital for the recourse liability equal to the amount of credit-risk exposure retained. Any recourse liability that is subject to this section 3(c) is not subject to any additional capital treatment under sections 3(a) or 3(b) of this appendix A.

Section 4. Implementation, Transition Rules, and Target Ratios

(a) December 31, 1990 to December 30, 1992. During this time period:

(1) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 7.25%.

(i) Fifty percent of this 7.25% must be made up of Tier 1 capital; however, up to 10% of Tier 1 capital can be comprised of Tier 2 capital elements, before any deductions for goodwill. The amount of Tier 2 elements included in Tier 1 will not be subject to the sublimits on the amount of such elements in Tier 2 capital, with the exception of the allowance for loan and lease losses.

(ii) Goodwill that national banks have been allowed to count as capital as a result of the transition rules contained in 12 CFR 3.3 is grandfathered until December 31, 1992, but will be deducted from Tier 1 capital after that date.

(2) The allowance for loan and lease losses can be included in total capital up to a maximum of 1.5% of a bank's risk-weighted assets, including the portion that can be borrowed to make up Tier 1.

(3) Tier 2 capital elements that are not used as part of Tier 1 capital will qualify as part of a national bank's total capital base up to a maximum of 100% of the bank's Tier 1 capital.

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(4) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

(b) On December 31, 1992. (1) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 8.0%.

(2) Tier 2 capital elements qualify as part of a national bank's total capital base up to a maximum of 100% of that bank's Tier 1 capital.

(3) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

Table 1--Summary of Risk Weights and Risk Categories

Category 1: Zero Percent

1. Cash (domestic and foreign).
2. Balances due from, and claims on, Federal Reserve Banks and central banks

in other OECD countries.

3. Claims on, or unconditionally guaranteed by, the U.S. Government or its agencies, or other OECD central governments.1

1 For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely repayment of principal and interest by the full faith and credit of the U.S. Government.

4. That portion of local currency claims on or unconditionally guaranteed by non-OECD central governments to the extent the bank has local currency liabilities in that country.

5. Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.

6. Federal Reserve Bank stock.

Category 2: 20 Percent

1. Portions of loans and other assets collateralized by securities issued or guaranteed by the U.S. Government or its agencies, or other OECD central governments.2

2 Degree of collateralization is determined by current market value.

2. Portions of loans and other assets conditionally guaranteed by the U.S. Government or its agencies, or other OECD central governments.

3. Portions of loans and other assets collateralized by cash on deposit in the lending institution.

4. All claims (long- and short-term) on, or guaranteed by, OECD depository institutions.

5. Claims on, or guaranteed by, non-OECD depository institutions with a residual maturity of one year or less.

6. Cash items in the process of collection.

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7. Securities and other claims on, or guaranteed by, U.S. Government-sponsored agencies.3

3 For the purpose of calculating the risk-based capital ratio, a U.S. Government-sponsored agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government.

8. Portions of loans and other assets collateralized by securities issued by, or guaranteed by, U.S. Government-sponsored agencies.4

4 Degree of collateralization is determined by current market value.

9. Claims that represent general obligations of, and portions of claims

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER I--COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY
PART 3--MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix A to Part 3--Risk-Based Capital Guidelines

Section 1. Purpose, Applicability of Guidelines, and Definitions.

(a) Purpose. (1) An important function of the Office of the Comptroller of the Currency ('OCC') is to evaluate the adequacy of capital maintained by each national bank. Such an evaluation involves the consideration of numerous factors, including the riskiness of a bank's assets and off-balance sheet items. This Appendix A implements the OCC's risk-based capital guidelines. The risk-based capital ratio derived from those guidelines is more systematically sensitive to the credit risk associated with various bank activities than is a capital ratio based strictly on a bank's total balance sheet assets. A bank's risk-based capital ratio is obtained by dividing its capital base (as defined in section 2 of this Appendix A) by its risk-weighted assets (as calculated pursuant to section 3 of this Appendix A). These guidelines were created within the framework established by the report issued by the Committee on Banking Regulations and Supervisory Practices in July 1988. The OCC believes that the risk-based capital ratio is a useful tool in evaluating the capital adequacy of all national banks, not just those that are active in the international banking system.

(2) The purpose of this Appendix A is to explain precisely (i) how a national bank's risk-based capital ratio is determined and (ii) how these risk-based capital guidelines are applied to national banks. The OCC will review these guidelines periodically for possible adjustments commensurate with its experience with the risk-based capital ratio and with changes in the economy, financial markets and domestic and international banking practices.

(b) Applicability. (1) The risk-based capital ratio derived from these guidelines is an important factor in the OCC's evaluation of a bank's capital adequacy. However, since this measure addresses only credit risk, the 8% minimum ratio should not be viewed as the level to be targeted, but rather as a floor. The final supervisory judgment on a bank's capital adequacy is based on an individualized assessment of numerous factors, including those listed in 12 CFR 3.10. With respect to the consideration of these factors, the OCC will give particular attention to any bank with significant exposure to declines in the economic value of its capital due to changes in interest rates. As a result, it may differ from the conclusion drawn from an isolated comparison of a bank's risk-based capital ration to the 8% minimum specified in these guidelines. In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

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(2) Effective December 31, 1990, these risk-based capital guidelines will apply to all national banks. In the interim, banks must maintain minimum capital-to-total assets ratios as required by 12 CFR Part 3, and should begin preparing for the implementation of these risk-based capital guidelines. In this regard, each national bank that does not currently meet the final minimum ratio established in section 4(b)(1) of this Appendix A should begin planning for achieving that standard.

(3) These risk-based capital guidelines will not be applied to federal branches and agencies of foreign banks.

(c) Definitions. For purposes of this Appendix A, the following definitions apply:

(1) 'Allowances for loan and lease losses' means the balance of the valuation reserve on December 31, 1968, plus additions to the reserve charged to operations since that date, less losses charged against the allowance net of recoveries.

(2) 'Associated company' means any corporation, partnership, business trust, joint venture, association or similar organization in which a national bank directly or indirectly holds a 20 to 50 percent ownership interest.

(3) 'Banking and finance subsidiary' means any subsidiary of a national bank that engages in banking- and finance-related activities.

(4) 'Cash items in the process of collection' means **checks** or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation in the country in which the reporting bank's office that is **clearing** or collecting the **check** or draft is located; U.S. Government **checks** that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation in the United States or the country in which the reporting bank's office that is handling the drafts is located; and unposted debits.

(5) Central government means the national governing authority of a country; it includes the departments, ministries and agencies of the central government and the central bank. The U.S. Central Bank includes the 12 Federal Reserve Banks. The definition of central government does not include the following: State, provincial, or local governments; commercial enterprises owned by the central government, which are entities engaged in activities involving trade, commerce, or profit that are generally conducted or performed in the private sector of the United States economy; and non-central government entities whose obligations are guaranteed by the central government.

(6) 'Commitment' means any arrangement that obligates a national bank to: (i) Purchase loans or securities; or (ii) extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, or similar transactions.

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(7) 'Common stockholders' equity' means common stock, common stock surplus, undivided profits, capital reserves, and adjustments for the cumulative effect of foreign currency translation, less net unrealized holding losses on available-for-sale equity securities with readily determinable fair values.

(8) 'Conditional guarantee' means a contingent obligation of the United States Government or its agencies, or the central government of an OECD country, the validity of which to the beneficiary is dependent upon some affirmative action--e.g., servicing requirements--on the part of the beneficiary of the guarantee or a third party.

(9) Deferred tax assets means the tax consequences attributable to tax

carryforwards and deductible temporary differences. Tax carryforwards are deductions or credits that cannot be used for tax purposes during the current period, but can be carried forward to reduce taxable income or taxes payable in a future period or periods. Temporary differences are financial events or transactions that are recognized in one period for financial statement purposes, but are recognized in another period or periods for income tax purposes. Deductible temporary differences are temporary differences that result in a reduction of taxable income in a future period or periods.

(10) 'Derivative contract' means generally a financial contract whose value is derived from the values of one or more underlying assets, reference rates or indexes of asset values. Derivative contracts include interest rate, foreign exchange rate, equity, precious metals and commodity contracts, or any other instrument that poses similar credit risks.

(11) 'Depository institution' means a financial institution that engages in the business of banking; that is recognized as a bank by the bank supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the U.S., this definition encompasses all federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institution. Bank holding companies are excluded from this definition. For the purposes of assigning risk weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

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(12) 'Exchange rate contracts' include: Cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the OCC, gives rise to similar risks.

(13) 'Goodwill' means an intangible asset that represents the excess of the purchase price over the fair market value of tangible and identifiable intangible assets acquired in purchases accounted for under the purchase method of accounting.

(14) 'Intangible assets' include mortgage servicing rights, purchased credit card relationships (servicing rights), goodwill, favorable leaseholds, and core deposit value.

(15) 'Interest rate contracts' include: Single currency interest rate swaps; basis swaps; forward rate agreements; interest rate options purchased; forward forward deposits accepted; and any similar instrument that, in the opinion of the OCC, gives rise to similar risks, including when-issued securities.

(16) Multifamily residential property means any residential property consisting of five or more dwelling units including apartment buildings, condominiums, cooperatives, and other similar structures primarily for residential use, but not including hospitals, nursing homes, or other similar facilities.

< Text of subsection (c)(17) effective April 1, 1996. >

(17) The OECD-based group of countries comprises all full members of the Organization for Economic Cooperation and Development (OECD) regardless of entry

date, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow,1 but excludes any country that has rescheduled its external sovereign debt within the previous five years. These countries are hereinafter referred to as OECD countries. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

1 As of November 1995, the OECD included the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States; and Saudi Arabia had concluded special lending arrangements with the IMF associated with the IMF's General Arrangements to Borrow.

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< Text of subsection (c)(17) effective until April 1, 1996. >

(17) 'OECD-based country' means a member of the grouping of countries that are full members of the Organization of Economic Cooperation and Development, plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. These countries are hereinafter referred to as 'OECD countries'.

(18) 'Original maturity' means, with respect to a commitment, the earliest possible date after a commitment is made on which the commitment is scheduled to expire (i.e., it will reach its stated maturity and cease to be binding on either party), provided that either:

(i) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(ii) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the customer at the time of the extension or renewal and upon a new, bona fide credit analysis utilizing current information on financial condition and trends.

(19) 'Preferred stock' includes the following instruments: (i) 'Convertible preferred stock,' which means preferred stock that is mandatorily convertible into either common or perpetual preferred stock; (ii) 'Intermediate-term preferred stock,' which means preferred stock with an original maturity of at least five years, but less than 20 years; (iii) 'Long-term preferred stock,' which means preferred stock with an original maturity of 20 years or more; and (iv) 'Perpetual preferred stock,' which means preferred stock without a fixed maturity date that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. For purposes of these instruments, preferred stock that can be redeemed at the option of the holder is deemed to have an 'original maturity' of the earliest possible date on which it may be so redeemed.

(20) 'Public-sector entities' include states, local authorities and governmental subdivisions below the central government level in an OECD country. In the United States, this definition encompasses a state, county, city, town, or other municipal corporation, a public authority, and generally any publicly-owned entity that is an instrumentality of a state or municipal corporation. This definition does not include commercial companies owned by the public sector.1a

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1a See Definition (5), 'Central government,' for further explanation of commercial companies owned by the public sector.

(21) 'Reciprocal holdings of bank capital instruments' means cross-holdings or other formal or informal arrangements in which two or more banking organizations swap, exchange, or otherwise agree to hold each other's capital instruments. This definition does not include holdings of capital instruments issued by other banking organizations that were taken in satisfaction of debts previously contracted, provided that the reporting national bank has not held such instruments for more than five years or a longer period approved by the OCC.

(22) 'Replacement cost' means, with respect to interest rate and exchange rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. The mark-to-market process should incorporate changes in both interest rates and counterparty credit quality.

(23) 'Residential properties' means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence.

(24) 'Risk-weighted assets' means the sum of total risk-weighted balance sheet assets and the total of risk-weighted off-balance sheet credit equivalent amounts. Risk-weighted balance sheet and off-balance sheet assets are calculated in accordance with Section 3 of this appendix A.

(25) 'State' means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

(26) 'Subsidiary' means any corporation, partnership, business trust, joint venture, association or similar organization in which a national bank directly or indirectly holds more than a 50% ownership interest. This definition does not include ownership interests that were taken in satisfaction of debts previously contracted, provided that the reporting bank has not held the interest for more than five years or a longer period approved by the OCC.

(27) 'Total capital' means the sum of a national bank's core (Tier 1) and qualifying supplementary (Tier 2) capital elements.

(28) 'Unconditionally cancelable' means, with respect to a commitment-type lending arrangement, that the bank may, at any time, with or without cause, refuse to advance funds or extend credit under the facility. In the case of home equity lines of credit, the bank is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by relevant Federal law.

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(29) 'United States Government or its agencies' means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States Government.

(30) 'United States Government-sponsored agency' means an agency originally established or chartered to serve public purposes specified by the United States Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

(31) Walkaway clause means a provision in a bilateral netting contract that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

Section 2. Components of Capital.

A national bank's qualifying capital base consists of two types of capital--core (Tier 1) and supplementary (Tier 2).

(a) Tier 1 Capital. The following elements comprise a national bank's Tier 1 capital:

(1) Common stockholders' equity;

(2) Noncumulative perpetual preferred stock and related surplus; and 2

2 Preferred stock issues where the dividend is reset periodically based upon current market conditions and the bank's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to Tier 2 capital, regardless of whether the dividends are cumulative or noncumulative.

(3) Minority interests in the equity accounts of consolidated subsidiaries.

(b) Tier 2 Capital. The following elements comprise a national bank's Tier 2 capital:

(1) Allowance for loan and lease losses, up to a maximum of 1.25% of risk-weighted assets,3 subject to the transition rules in section 4(a)(2) of this appendix A;

3 The amount of the allowance for loan and lease losses that may be included in capital is based on a percentage of risk-weighted assets. The gross sum of risk-weighted assets used in this calculation includes all risk-weighted assets, with the exception of the assets required to be deducted under section 3 in establishing risk-weighted assets (i.e., the assets required to be deducted from capital under section 2(c)) of this appendix. A banking organization may deduct reserves for loan and lease losses in excess of the amount permitted to be included as capital, as well as allocated transfer risk reserves and reserves held against other real estate owned, from the gross sum of risk-weighted assets in computing the denominator of the risk-based capital ratio.

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(2) Cumulative perpetual preferred stock, long-term preferred stock, convertible preferred stock, and any related surplus, without limit, if the issuing national bank has the option to defer payment of dividends on these

crediting date, but may not avoid paying dividends.

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3. Closed accounts. Subject to state or other law, a credit union may choose not to pay accrued dividends if members close an account prior to the date accrued dividends are credited, as long as the credit union has disclosed that fact. If accrued dividends are paid, accrued dividends must be paid on funds up until the account is closed or the account is deemed closed. For example, if an account is closed on a Tuesday, accrued dividends on the funds through Monday would be paid. Whether (and the conditions under which) credit unions are permitted to deem an account closed by a member is determined by state or other law, if any. Credit unions are cautioned that bylaw requirements may prevent a credit union from deeming a member's account closed until certain time periods are extinguished. (See NCUA Standard FCU Bylaws, Art. III, Sec. 3 (members have at least 6 months to replenish membership share before membership can terminate and the account is deemed closed). Such bylaw requirements may not be overridden without proper agency approval.)

(c) Date Dividends Begin to Accrue

1. Relation to Regulation CC. Credit unions may rely on the Expedited Funds Availability Act (EFAA) and Regulation CC (12 CFR part 229) to determine, for example, when a deposit is considered made for purposes of dividend accrual, or when dividends need not be paid on funds because a deposited check is later returned unpaid.

2. Ledger and collected balances. Credit unions may calculate dividends by using a 'ledger' balance or 'collected' balance method, as long as the crediting requirements of the EFAA are met (12 CFR 229.14).

3. Withdrawal of principal. Credit unions must accrue dividends on funds until the funds are withdrawn from the account. For example, if a check is debited to an account on a Tuesday, the credit union must accrue dividends on those funds through Monday.

Section 707.8--Advertising

(a) Misleading or Inaccurate Advertisements

1. General. All advertisements are subject to the rule against misleading or inaccurate advertisements, even though the disclosure applicable to various media differ. The word 'profit' may be used when referring to dividend-bearing share accounts, as it reflects the nature of dividends. The word 'profit' may not be used when referring to interest-bearing deposit accounts.

2. Indoor signs. An indoor sign advertising an annual percentage yield is not misleading or inaccurate if:

i. For a tiered-rate account, it also provides the upper and lower dollar amounts of the tier corresponding to the advertised annual percentage yield.

ii. For a term share account, it also provides the term required to obtain the advertised annual percentage yield.

3. 'Free' or 'no cost' accounts. For purposes of determining whether an account can be advertised as 'free' or 'no cost,' maintenance and activity fees include:

i. Any fee imposed if a minimum balance requirement is not met, or if the member exceeds a specified number of transactions.

ii. Transaction and service fees that members reasonably expect to be imposed on an account on a regular basis (see comments 4(b)(4)-1 and 2).

iii. A flat fee, such as a monthly service fee.
iv. Fees imposed to deposit, withdraw or transfer funds, including per-check or per-transaction charges (for example, $.25 for each withdrawal, whether by check, in person).

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4. Other fees. Examples of fees that are not maintenance or activity fees include:
i. Fees that are not required to be disclosed under Sec. 707.4(b)(4).
ii. Check printing fees of any type.
iii. Fees for obtaining copies of checks, whether or not the original checks have been truncated or returned to the member periodically.
iv. Balance inquiry fees.
v. Fees assessed against a dormant account.
vi. Fees for using an ATM.
vii. Fees for electronic transfer services that are not required to obtain an account, such as preauthorized transfers or home electronic credit union services.
viii. Stop payment fees and fees for share drafts or checks returned unpaid.
5. Similar terms. An advertisement may not use a term such as 'fees waived' if a maintenance or activity fee may be imposed because it is similar to the terms 'free' or 'no cost.'
6. Specific account services. Credit unions may advertise a specific account service or feature as free as long as no fee is imposed for that service or feature. For example, credit unions offering an account that is free of deposit or withdrawal fees could advertise that fact, as long as the advertisement does not mislead members by implying that the account is free and that no other fee (a monthly service fee, for example) may be charged.
7. Free for limited time. If an account (or a specific account service) is free only for a limited period of time--for example, for one year following the account opening--the account (or service) may be advertised as free as long as the time period is stated.
8. Conditions not related to share accounts. Credit unions may advertise accounts as 'free' for members that meet conditions not related to share accounts, such as the member's age. For example, credit unions may advertise a share draft account as 'free for persons over 65 years old,' even though a maintenance or activity fee may be assessed on accounts held by members that are 65 or younger.

(b) Permissible Rates

1. Tiered-rate accounts. An advertisement for a tiered-rate account that states an annual percentage yield must also state the annual percentage yield for each tier, along with corresponding minimum balance requirements. Any dividend rates stated must appear in conjunction with the annual percentage yields for each tier.
2. Stepped-rate accounts. An advertisement that states a dividend rate for a stepped-rate account must state all the dividend rates and the time period that each rate is in effect.

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3. Representative examples. An advertisement that states an annual percentage yield for a type of account (such as a term share account for a specified term) need not state the annual percentage yield applicable to every variation offered by the credit union or indicate that other maturity terms are

available. In an advertisement stating that rates for an account may vary depending on the amount of the initial deposit or the term of a term share account, credit unions need not list each balance level and term offered. Instead, the advertisement may:

i. Provide a representative example of the annual percentage yields offered, clearly described as such. For example, if a credit union offers a $25 bonus on all term share accounts and the annual percentage yield will vary depending on the term selected, the credit union may provide a disclosure of the annual percentage yield as follows: 'For example, our 6-month share certificate currently pays a 3.15% annual percentage yield.'

ii. Indicate that various rates are available, such as by stating short-term and longer-term maturities along with the applicable annual percentage yields: 'We offer share certificates with annual percentage yields that depend on the maturity you choose. For example, our one-month share certificate earns a 2.75% APY. Or, earn a 5.25% APY for a three-year share certificate.'

(c) When Additional Disclosures are Required

1. Trigger terms. The following are examples of information stated in advertisements that are not 'trigger' terms:

i. 'One, three, and five year share certificates available'.

ii. 'Bonus rates available'.

iii. '1% over our current rate,' so long as the rates are not determinable from the advertisement.

(c)(2) Time Annual Percentage Yield is Offered

1. Specified recent date. If an advertisement discloses an annual percentage yield as of a specified date, that date must be recent in relation to the publication or broadcast frequency of the media used. For example, the printing date of a brochure printed once for an account promotion that will be in effect for six months would be considered 'recent,' even though rates change during the six-month period. Dividend rates published in a daily newspaper or on television must be a rate offered shortly before (or on) the date the rates are published or broadcast. Similarly, dividend rates published in a daily newspaper or on television must be a rate reflecting either the preceding dividend period, or a prospective rate, and the option chosen should be noted.

2. Reference to date of publication. An advertisement may refer to the annual percentage yield as being accurate as of the date of publication, if the date is on the publication itself. For instance, an advertisement in a periodical may state that a rate is 'current through the date of this issue,' if the periodical shows the date.

(c)(5) Effect of Fees

---------- **Page 65784 follows** ----------

1. Scope. This requirement applies only to maintenance or activity fees as described in paragraph 8(a).

(c)(6) Features of Term Share Accounts

(c)(6)(i) Time Requirements

1. Club accounts. If a club account has a maturity date, but the term may

vary depending on when the account is opened, credit unions may use a phrase such as: 'The maturity date of this club account is November 15; its term varies depending on when the account is opened.'

(c)(6)(ii) Early Withdrawal Penalties

1. Discretionary penalties. Credit unions imposing early withdrawal penalties on a case-by-case basis may disclose that they 'may' (rather than 'will') impose a penalty if that accurately describes the account terms.

(d) Bonuses

1. General reference to 'bonus.' General statements such as 'bonus checking' or 'get a bonus when you open a checking account' do not trigger the bonus disclosures.

(e) Exemption for Certain Advertisements

(e)(1) Certain Media

(e)(1)(i)

1. ATM messages. Messages provided on ATM or computer screens are eligible for this exemption.

(e)(1)(iii)

1. Tiered-rate accounts. Solicitations for tiered-rate accounts made through telephone response machines must provide all annual percentage yields and the balance requirements applicable to each tier.

(e)(2) Indoor Signs

(e)(2)(i)

1. General. Indoor signs include advertisements displayed on computer screens, banners, preprinted posters, and chalk or peg boards. Any advertisement inside the premises that can be retained by a member (such as a brochure or a printout from a computer) is not an indoor sign.

2. Members outside the premises. Advertisements may be 'indoor signs' even though they may be viewed by members from outside. An example is a banner in a credit union's glass-enclosed branch office, that is located behind a teller facing members but is readable by passersby.

(e)(3) Newsletters

1. General. The partial exemption applies to all credit union newsletters, whether instituted before or after the compliance date of part 707. Nor must a newsletter be of any particular circulation frequency (e.g., weekly, monthly, quarterly, biannually, annually, or irregularly) or of any certain format (e.g. magazine, bulletin, broadside, circular, mimeograph, letter, or pamphlet) in order to be eligible for the partial advertising exemption.

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2. Permissible Distribution. In order for newsletters to retain the partial

advertising exemption, newsletters can be sent to existing credit union members only. Any distribution reasonably calculated to reach only members is also acceptable, such as:

i. Mailing newsletters to existing members.

ii. Distributing newsletters at a function reasonably limited to members, such as an annual meeting or member picnic.

iii. Displaying or offering newsletters at a credit union lobby, branch, or office.

3. Impermissible Distribution. Distributing a newsletter in a place open to nonmembers, such as a sponsor's lunch room, is not reasonably calculated to reach only members, and such newsletter would be subject to all applicable advertising rules.

Section 707.9--Enforcement and Record Retention

(c) Record Retention

1. Evidence of required actions. Credit unions comply with the regulation by demonstrating they have done the following:

i. Established and maintained procedures for paying dividends and providing timely disclosures as required by the regulation, and

ii. Retained sample disclosures for each type account offered to members, such as account-opening disclosures, copies of advertisements, and change-in-term notices; and information regarding the dividend rates and annual percentage yields offered.

2. Methods of retaining evidence. Credit unions must be able to reconstruct the required disclosures or other actions. They need not keep disclosures or other business records in hard copy. Records evidencing compliance may be retained on microfilm, microfiche, or by other methods that reproduce records accurately (including computer files). Credit unions must retain copies of all printed advertisements and the text of all advertisements conveyed by electronic or broadcast media, and newsletters.

3. Payment of dividends. Credit unions must retain sufficient rate and balance information to permit the verification of dividends paid on an account, including the payment of dividends on the full principal balance.

[59 FR 59899, Nov. 21, 1994; 60 FR 21699, May 3, 1995; 60 FR 25121, May 11, 1995]

<<PART 707--TRUTH IN SAVINGS>>

Authority: 12 U.S.C. 4311.

Source: 58 FR 50445, Sept. 27, 1993; 59 FR 39425, Aug. 3, 1994; 60 FR 57173, Nov. 14, 1995, unless otherwise noted.

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4. Stepped-rate accounts. A single composite annual percentage yield must be disclosed for stepped-rate accounts. (See Appendix A, Part I, Paragraph B.) The dividend rates and the period of time each will be in effect also must be provided. When the initial rate offered for a specified time on a variable-rate account is higher or lower than the rate that would otherwise be paid on the account, the calculation of the annual percentage yield must be made as if for a stepped-rate account. (See Appendix A, Part I, Paragraph C.)

5. Minimum balance accounts. If a credit union sets a minimum balance to earn dividends, the credit union may, but need not, state that the annual percentage yield is 0% for those days the balance in the account drops below the minimum balance level when using the daily balance method. Nor is a disclosure of 0% required for credit unions using the average daily balance method, if the member fails to meet the minimum balance required for the average daily balance period.

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(b)(1)(ii) Variable Rates

(b)(1)(ii)(B)

1. Determining dividend rates. To disclose how the dividend rate is determined, credit unions must:

i. Identify the index and specific margin, if the dividend rate is tied to an index.

ii. State that rate changes are within the credit union's discretion, if the credit union does not tie changes to an index.

(b)(1)(ii)(C)

1. Frequency of rate changes. A credit union reserving the right to change rates at its discretion must state the fact that rates may change at any time.

(b)(1)(ii)(D)

1. Limitations. A floor or ceiling on rates or on the amount the rate may decrease or increase during any time period must be disclosed. Credit unions need not disclose the absence of limitations on rate changes.

(b)(2) Compounding and Crediting

(b)(2)(i) Frequency

1. General. Descriptions such as 'quarterly' or 'monthly' are sufficient. Irregular crediting and compounding periods, such as if a cycle is out short at year end for tax reporting purposes, need not be disclosed.

2. Dividend period. For dividend-bearing accounts, the dividend period must be disclosed. (A specific example must also be given, see Appendix B, sB-1(c).) The dividend period for term share accounts generally may be disclosed as the account's term (e.g., two years).

(b)(2)(ii) Effect of Closing an Account

1. Deeming an account closed. A credit union may, subject to state or other law, provide in account contracts the actions by members that will be treated as closing the account and that will result in the forfeiture of accrued but uncredited dividends. An example is the withdrawal of all funds from the account prior to the date dividends are credited. Credit unions are cautioned that bylaw requirements may prevent a credit union from deeming a member's account closed until certain time periods are extinguished if funds remain in a member's account. NCUA Standard FCU Bylaws, Art. III, Sec. 3 (members have at least 6 months to replenish membership share before membership terminates and account is deemed closed). Such bylaw requirements may not be overridden without proper agency approval.

(b)(3) Balance Information

(b)(3)(i) Minimum Balance Requirements

1. Par value. Credit unions must disclose any minimum balance required to open the account, to avoid the imposition of a fee, or to obtain the annual percentage yield. Since members cannot generally maintain any accounts until the par value of the membership share is paid in full, this section requires that credit unions disclose the par value of a share necessary to become a member and maintain accounts at the credit union. The par value of a share and the minimum balance requirement do not have to be the same amount (e.g., a credit union may have a $5 par value for a membership share, in order for accounts to be opened and maintained, and a $100 minimum balance requirement, in order for the account to earn dividends).

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2. Disclosures. The explanation of minimum balance computation methods may be combined with the balance computation method disclosures (s 707.4(b)(3)(ii)) if they are the same. If a credit union uses different cycles for determining minimum balance requirements for purposes of assessing fees and for paying dividends, the credit union must disclose the specific cycle or time period used for each purpose (e.g., use of a midmonth statement cycle for determining dividends, and use of a calendar month cycle for determining fees). Credit unions may assess fees by using any method. If fees on one account are tied to the balance in another account, such provision must be explained (e.g., if share draft fees are tied to a minimum balance in the regular share account (or a combination of the share draft and regular share accounts), the share draft account must explain that fact and how the balance in the regular share account (or both accounts) is determined). The fee need not be disclosed in the account disclosures if the fee is not imposed on that account.

(b)(3)(ii) Balance Computation Method

1. Methods and periods. Credit unions may use different methods or periods to calculate minimum balances for purposes of imposing a fee (the daily balance for a calendar month, for example) and accruing dividends (the average daily balance for a statement period, for example). Each method and corresponding period must be disclosed.

(b)(3)(iii) When dividends begin to accrue

1. Additional information. Credit unions must include a statement as to when dividends begin to accrue for noncash deposits. Credit unions may disclose additional information such as the time of day after which deposits are treated as having been received the following business day, and may use additional descriptive terms such as 'ledger' or 'collected' balances to disclose when dividends begin to accrue. Under the ledger balance method, dividends begin to accrue on the day of deposit. Under the collected balance methods, dividends begin to accrue when provisional credit is received for the item deposited.

(b)(4) Fees

1. Types of fees. Fees related to the routine use of an account must be disclosed. The following are types of fees that must be disclosed in connection with an account:

i. Maintenance fees, such as monthly service fees.

ii. Fees related to share deposits or withdrawals.

iii. Fees for special services, such as stop payment fees, fees for balance inquiries or verification of share and deposits, fees associated with checks returned unpaid, fees for regularly sending to members share drafts that otherwise would be held by the credit union, and overdraft line of credit access fees (if charged against the share account).

iv. Fees to open or to close an account.

v. Fees imposed upon dormant or inactive accounts.

2. Other fees. Credit unions need not disclose fees such as the following:

i. Fees for services offered to members and nonmembers alike, such as fees for certain travelers **checks,** for wire transfers and automated **clearinghouse** (ACH) transfers, to process credit card cash advances, or to handle U.S. Savings Bond Redemption (even if different amounts are charged to members and nonmembers).

ii. Incidental fees, such as fees associated with state escheat laws, garnishment or attorneys fees, to change names on an account, to generate a midcycle periodic statement, to wrap loose coins, for photocopying, for statements returned to the credit union because of a wrong address, and locator fees.

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3. Amount of fees. Credit unions are cautioned that merely providing fee information in an account disclosure may not be sufficient to gain the legal right to impose the fee involved under applicable law. Credit unions must state the amount and conditions under which a fee may be imposed. Naming and describing the fee typically satisfies this requirement. Some examples are:

i. '$4.00 monthly service fee'.

ii. $7.00 and up' or 'fee depends on style of checks ordered' for check printing fees.

4. Tied-accounts. Credit unions must state if fees that may be assessed against an account are tied to other accounts at the credit union. For example, if a credit union ties the fees payable on a share draft account to balances held in the share draft account and in a regular share account, the share draft account disclosures must state that fact and explain how the fee is determined.

5. Regulation E statements. Some fees are required to be disclosed under both Regulation E (12 CFR 205.7) and part 707. If such fees, such as ATM transaction fees, are disclosed on a Regulation E statement, they need not be disclosed again on a periodic statement required under part 707.

(b)(5) Transaction Limitations

1. General rule. Examples of limitations on the number of dollar amount of share deposits or withdrawals that credit unions must disclose are:

i. Limits on the number of share drafts or checks that may be written on an account for a given time period.

ii. Limits on withdrawals or share deposits during the term of a term share account.

iii. Limitations required by Regulation D, such as the number of withdrawals permitted from money market share accounts by check to third parties each month (credit unions need not disclose reservation of right to require a notice for withdrawals from accounts required by federal or state law).

(b)(6) Features of Term Share Accounts

(b)(6)(i) Time Requirements

1. 'Callable' term share accounts. In addition to the maturity date, credit unions must state the date or the circumstances under which the credit union may redeem a term share account at the credit union's option (a 'callable' term share account).

(b)(6)(ii) Early Withdrawal Penalties

1. General. The term 'penalty' may, but need not, be used to describe the loss that may be incurred by members for early withdrawal of funds from term share accounts.

2. Examples. Examples of early withdrawal penalties are:

i. Monetary penalties, such a specific dollar amount (e.g., '$10.00') or a specific days' worth of dividends (e.g., 'seven days' dividends plus accrued but uncredited dividends, but only if the account is closed').

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ii. Adverse changes to terms such as the lowering of the dividend rate, annual percentage yield, or reducing the compounding or crediting frequency for funds remaining in shares or on deposit.

iii. Reclamation of bonuses.

3. Relation to rules for IRAs or similar plans. Penalties imposed by the Internal Revenue Code for certain withdrawals from IRAs or similar pension or savings plans are not early withdrawal penalties for purposes of this regulation.

4. Disclosing penalties. Penalties may be stated in months, whether credit unions assess the penalty using the actual number of days during the period or using another method such as a number of days that occurs in any actual sequence of the total calendar months involved. For example, stating 'one month's dividends' is permissible, whether the credit union assesses 30 days' dividends during the month of April, or selects a time period between 28 and 31 days for calculating the dividends for all early withdrawals regardless of when the penalty is assessed.

(b)(6)(iv) Renewal Policies

1. Rollover term share accounts. Credit unions are not required to provide a grace period, to pay dividends during the grace period, or to disclose whether or not dividends will be paid during the grace period. Credit unions offering a grace period on term share accounts must give the length of the grace period.

Commentary, Appendix B, Model Clauses, sB-1(i)(iv).

2. Nonrollover term share accounts. Credit unions that pay dividends on funds following the maturity of term share accounts that do not renew automatically need not state the rate (or annual percentage yield) that may be paid.

(b)(7) Bonuses

1. General. Credit unions are required to state the amount and type of bonus, and disclose any minimum balance or time requirement to obtain the bonus and when the bonus will be provided. If the minimum balance or time requirement is otherwise required to be disclosed, credit unions need not duplicate the disclosure for purposes of this paragraph.

(b)(8) Nature of Dividends

1. General. Dividends are not payable until declared and unless sufficient current and undivided earnings are available after required transfers to reserves at the close of a dividend period. A disclosure explaining dividends educates members and protects credit unions in the event that a prospective dividend cannot be paid, or is not properly payable. This disclosure is required for all dividend-bearing share accounts. Term share accounts need not include a statement regarding the nature of dividends.

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2. State-chartered credit unions with interest-bearing deposit accounts. State law controls the nature of accounts (i.e., whether an account is a share account or a deposit account). If a member of a state-chartered credit union is opening only an interest-bearing deposit account, or is requesting account disclosures only for an interest-bearing deposit account (if state law requires the depositor to hold a share account), the disclosures must generally include the following information on any dividend-bearing share portion of the account (e.g., membership share): the par value of a share; a statement that the portion of the deposit that represents the par value of the membership share will earn dividends, and that dividends are paid from current income and available earnings after required transfers to reserves. Further additional disclosures, such as a separate dividend rate and annual percentage yield for the membership share, are not required (if the additional disclosures would agree with the remainder of the account which is invested in an interest-bearing deposit).

(c) Notice to Existing Accountholders

1. General. Only members who receive periodic statements (provided regularly at least four times per year) and who hold accounts of the type offered by the credit union as of the compliance date of part 707 (generally January 1, 1995) must receive the notice. If following receipt of the notice members request disclosures, credit unions have twenty calendar days from receipt of the request to provide the disclosures. Rate and annual percentage yield information in such disclosures must conform to that required for disclosures upon request. As an alternative to including the notice in or on the periodic statement, the final rule permits credit unions to send the account disclosures themselves, as long as they are sent at the same time as the periodic statement (the disclosures may be mailed either with the periodic statement or separately).

2. Form of the notice. The notice may be included on the periodic statement, in a member newsletter, or on a statement stuffer or other insert, if it is

clear and conspicuous. The notice cannot be sent in a separate mailing from the periodic statement.

3. Timing. The notice may accompany the first periodic statement after the compliance date for part 707, or the periodic statement for the first cycle beginning after that date. For example, a credit union's statement cycle is December 15, 1994-January 14, 1995. The statement is mailed on January 15, The next cycle is January 15, 1995 through February 14, 1995, and the statement for that cycle is mailed on February 15. The credit union may provide the notice either on or with the January 15 statement or on or with the February 15 statement, as it covers the first cycle after January 1, 1995.

4. Early compliance. Credit unions that provide the notice to existing members prior to the compliance date of part 707, must be prepared to provide accurate and timely disclosures when, following receipt of the notice, members ask for account disclosures. Such disclosures must be provided even if they are requested before the compliance date of part 707. Credit unions who provide early notice to existing members need to comply with other aspects of part 707, but need not provide disclosures already provided in compliance with part 707.

Section 707.5--Subsequent Disclosures

(a) Change in Terms

---------- **Page 65772 follows** ----------

(a)(1) Advance Notice required

1. Form of notice. Credit unions may provide a change-in-term notice on or with a regular periodic statement or in another mailing (such as a highlighted portion of a newsletter or statement stuffer insert). If a credit union provides notice through revised account disclosures, the changed term must be highlighted in some manner. For example, credit unions may state that a particular fee has been changed (also specifying the new amount) or use an accompanying letter that refers to the changed term. Credit unions are cautioned that unless credit unions have reserved the right to change terms in the account agreement or disclosures, a change-in-terms notice may not be sufficient to amend the terms under applicable law.

2. Effective date. An example of a language for disclosing the effective date of a change is: 'As of May 11, 1995'.

3. Terms that change upon the occurrence of an event. A credit union offering terms that will automatically change upon the occurrence of a stated event need not send an advance notice of the change provided the credit union fully describes the conditions of the change in the account opening disclosures (and sends any change-in-term notices regardless of whether the changed term affects that member's account at that time).

4. Examples. Examples of changes not requiring an advance change-in-terms notice are:

i. The termination of employment for employee-members for whom account maintenance or activity fees were waived during their employment by the credit union.

ii. The expiration of one year in a promotion described in the account opening disclosures to 'waive $4.00 monthly service charges for one year'.

(a)(2) No Notice Required

(a)(2)(ii) Check Printing Fees

1. Increase in fees. A notice is not required for an increase in fees for printing share drafts (or deposit and withdrawal slips) even if the credit union adds some amount to the price charged by the vendor.

(b) Notice Before Maturity for Term Share Accounts Longer Than One Month That Renew Automatically.

1. Maturity dates on nonbusiness days. In determining the term of a term share account, credit unions may disregard the fact that the term will be extended beyond the disclosed number of days if the maturity date falls on a nonbusiness day. For example, a holiday or weekend may cause a 'one-year' term share account to extend beyond 365 days (or 366, in a leap year), or a 'one-month' term share account to extend beyond 31 days.

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2. Disclosing when rates will be determined. Ways to disclose when the annual percentage yield will be available include the use of:

i. A specific date, such as 'October 28'.

ii. A date that is easily discernible, such as 'the Tuesday prior to the maturity date stated on the notice' or 'as of the maturity date stated on this notice'.

3. Alternative timing rule. Under the alternative timing rule, a credit union that offers a 10-day grace period would have to provide the disclosures at least 10 calendar days prior to the scheduled maturity date.

4. Club accounts. If members have agreed to the transfer of payments from another account to a club term share account for the next club period, the credit union must comply with the requirements for automatically renewable term share accounts--even though members may withdraw funds from the club account at the end of the current club period.

5. Renewal of a term share account. In the case of a change-in-terms that becomes effective if a rollover term share account is subsequently renewed:

i. If the change is initiated by the credit union, the disclosure requirements of this paragraph apply. (Section 707.5(a) applies if the change becomes effective prior to the maturity of the existing term share account.)

ii. If the change is initiated by the member, the account opening disclosure requirements of Sec. 707.4(b) apply. (If the notice required by this paragraph has been provided, credit unions may give new account disclosures or disclosures that reflect the new term.)

6. Example. If a member receives a notice prior to maturity on a one-year term share account and requests a rollover to a six-month account, the credit union must provide either account opening disclosures including the new maturity date or, if all other terms previously disclosed in the prematurity notice remain the same, only the new maturity date.

(b)(1) Maturities of Longer Than One Year

1. Highlighting changed terms. Credit unions need not highlight terms that have changed since the last account disclosures were provided.

(c) Notice for Term Share Accounts One Month or Less That Renew Automatically

1. Providing disclosures within a reasonable time. Generally, 20 calendar days after an account renews is a reasonable time for providing disclosures. For term share accounts shorter than 20 days, disclosures should be given prior to the next scheduled renewal date. For example, if a term share account automatically renews every seven days, disclosures about an account that renews on Wednesday, December 6, 1995, should be given prior to Wednesday, December 13, 1995.

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(d) Notice Before Maturity for Term Share Accounts Longer Than One Year That Do not Renew Automatically

1. Subsequent account. When funds are transferred following maturity of a nonrollover term share account, credit unions need not provide account disclosures unless a new account is established.

Section 707.6--Periodic Statement Disclosures

(a) Rule When Statement and Crediting Periods Vary

1. General. Credit unions are not required to provide periodic statements. If they provide periodic statements, disclosures need only be furnished to the extent applicable. For example, if no dividends are earned for a statement period, credit unions need not state that fact. Or, credit unions may disclose '$0' dividends earned and '0%' annual percentage yield earned.

2. Regulation E interim statements. When a credit union provides regular quarterly statements, and in addition provides a monthly interim statement to comply with Regulation E, the interim statement need not comply with this section unless it states dividend or rate information. (See 12 CFR 205.9). For credit unions that choose not to treat Regulation E activity statements as part 707 periodic statements, the quarterly periodic statement must reflect the annual percentage yield earned and dividends earned for the full quarter. However, credit unions choosing this option need not redisclose fees already disclosed on an interim Regulation E activity statement on the quarterly periodic statement. For credit unions that choose to treat Regulation E activity statements as part 707 periodic statements, the Regulation E statement must meet all part 707 requirements.

3. Combined statements. Credit unions may provide certain information about an account (such as a money market share account or regular share account) on the periodic statement for another account (such as a share draft account) without triggering the disclosures required by this section, as long as:

i. The information is limited to information such as the account number, the type of account, balance information, accountholders' names, and social security or tax identification number; and

ii. The credit union also provides members a periodic statement complying with this section for the account (the money market share account or regular share account, in the example).

4. Other information. Additional information that may be given on or with a periodic statement, includes:

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i. Dividend rates and corresponding periodic rates to the dividend rate

applied to balances during the statement period.

ii. The dollar amount of dividends earned year-to-date.

iii. Bonuses paid (or any de minimis consideration of $10 or less).

iv. Fees for other products, such as safe deposit boxes.

v. Accounts not covered by the periodic statement disclosure requirements (passbook and term share accounts) may disclose any information on the statement related to such accounts, so long as such information is accurate and not misleading.

5. When statement and crediting periods vary. This rule permits credit unions, on dividend-bearing share accounts, to report the annual percentage yield earned and the amount of dividends earned on a statement other than on each periodic statement when the dividend period does not agree with, varies from, or is different than, the statement period. For dividend-bearing share accounts, credit unions may disclose the required information either upon each periodic statement, or on the statement on which dividends are actually earned (credited or posted) to the member's account. In addition, for accounts using the average daily balance method of calculating dividends, when the average daily balance period and the statement periods do not agree, vary or are different, credit unions may also report annual percentage yield earned and the dollar amount of dividends earned on the periodic statement on which the dividends or interest is earned. For example, if a credit union has quarterly dividend periods, or uses a quarterly average daily balance on an account, the first two monthly statements may not state annual percentage yield earned and dividends earned figures; the third 'monthly' statement will reflect the dividends earned and the annual percentage yield earned for the entire quarter. The fees imposed disclosure must be given on the periodic statement on which they are imposed.

6. Length of the period. Credit unions must disclose the length of both the dividend period (or average daily balance calculation period) and the statement period. For example, a statement could disclose a statement period of April 16 through May 15 and further state that 'the dividends earned and the annual percentage yield earned are based on your dividend period (or average daily balance) for the period April 1 through April 30.'

7. Dividend period more frequent than statement period. Credit unions that calculate dividends on a monthly basis, but send statements on a quarterly basis, may disclose a single dividend (and annual percentage yield earned) figure. Alternatively, a credit union may disclose three dividends earned and three annual percentage yield earned figures, one of each month in the quarter, as long as the credit union states the number of days (or beginning and ending date) in each dividend period if it varies from the statement period.

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8. Additional voluntary disclosures. For credit unions not disclosing the annual percentage yield earned and dividends earned on all periodic statements, credit unions may place a notice on statements without dividends and annual percentage yield earned figures, that the annual percentage yield earned and dollar amount of dividends earned will appear on the first statement at the close of the dividend (or average daily balance) period, or similar wording. Credit unions may also choose to include a telephone number to call for interim information, if desired by a member.

(b) Statement Disclosures

(b)(1) Annual Percentage Yield Earned

1. Ledger and collected balances. Credit unions that accrue interest using the collected balance method may use either the ledger or collected balance methods to determine the balance used to determine the annual percentage yield earned. Ledger balance means the record of the balance in a member's account, as per the credit union's records. (The ledger balance may reflect additions and deposits for which the credit union has not yet received final payment). Collected balance means the record of balance in a member's account reflecting collected funds, that is, cash or checks deposited in the credit union which have been presented for payment and for which payment has actually been received. (See Regulation CC, 12 CFR 229.14).

(b)(2) Amount of Dividends or Interest

1. Definition of earned. The term 'earned' is defined to include dividends and interest either 'accrued' or 'paid and credited.' Credit unions may use either the 'ledger' or the 'collected' balance for either option. (See 707.6(b)(1)1. and 707.7(c)2. of this Appendix.)

2. Accrued interest. Credit unions must state the amount of interest that accrued during the statement period, even if it was not credited.

3. Terminology. In disclosing dividends earned for the period, credit unions must use the term 'dividends' or terminology such as: 'Dividends paid,' to describe dividends that have been credited; 'Dividends accrued,' to indicate that dividends are not yet credited.

4. Closed accounts. If a member closes an account between crediting periods and forfeits accrued dividends, the credit union may not show any figures for 'dividends earned' or annual percentage yield earned for the period (other than zero, at the credit union's option).

5. Extraordinary dividends. Extraordinary dividends are not a component of the annual percentage yield earned or the dividend rate, but are an addition to the member's account. The dollar amount of the extraordinary dividends paid, denoted as a separate, identified figure, must be disclosed on the periodic statement on which the extraordinary dividends are earned. A credit union may also disclose information regarding the calculation of the extraordinary dividends, and additional annual percentage yield earned and dividend rate figures taking into account the extraordinary dividend, so long as such information is accurate and not misleading.

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(b)(3) Fees Imposed

1. General. Periodic statements must state fees disclosed under Sec. 707.4(b) that were debited to the account during the statement period, even if assessed for an earlier period.

2. Itemizing fees by type. In itemizing fees imposed more than once in the period, credit unions may group fees if they are the same type. But, the description must make **clear** that the dollar figure represents more than a single fee, for example, 'total fees for **checks** written this period.'

Examples of fees that may not be grouped together are:

i. Monthly maintenance with excess activity fees.

ii. 'Transfer' fees, if different dollar amounts are imposed--such as $.50 for share deposits and $1.00 for withdrawals.

iii. Fees for electronic fund transfers with fees for other services, such as

balance inquiry or maintenance fees.

3. Identifying fees. Statement details must enable the member to identify the specific fee. For example:

i. Credit unions may use a code to identify a particular fee if the code is explained on the periodic statement or in documents accompanying the statement.

ii. Credit unions using debit slips may disclose the date the fee was debited on the periodic statement and show the amount and type of fee on the dated debit slip.

4. Relation to Regulation E. Disclosure of fees in compliance with Regulation E complies with this section for fees related to electronic fund transfers (for example, totaling all electronic funds transfer fees in a single figure).

(b)(4) Length of Period

1. General. Credit unions providing the beginning and ending dates of the period must make clear whether both dates are included in the period. For example, stating 'April 1 through April 30' would clearly indicate that both April 1 and April 30 are included in the period.

2. Opening or closing an account mid-cycle. If an account is opened or closed during the period for which a statement is sent, credit unions must calculate the annual percentage yield earned based on account balances for each day the account was open.

Section 707.7--Payment of Dividends

(a) Permissible Methods

1. Prohibited calculation methods. Calculation methods that do not comply with the requirement to pay dividends on the full amount of principal in the account each day include:

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i. The 'rollback' method, also known as the 'grace period' or 'in by the 10th' method, where credit unions pay dividends on the lowest balance in the account for the period.

ii. The 'increments of par value' method, where credit unions only pay dividends on full shares in an account, e.g., a credit union with $5 par value shares pays dividends on $20 of a $24 account balance.

iii. The 'ending balance' method, where credit unions pay dividends on the balance in the account at the end of the period.

iv. The 'investable balance' method, where credit unions pay dividends on a percentage of the balance, excluding an amount credit unions set aside for reserve requirements.

v. The 'low balance' method, where credit unions pay dividends on the lowest balance in the account for any day in that period.

2. Use of 365-day basis. Credit unions may apply a daily periodic rate that is greater than 1/365 of the dividend rate--such as 1/360 of the dividend rate--as long as it is applied 365 days a year.

3. Periodic dividend payments. A credit union can pay dividends each day on the account and still make uniform dividend payments. For example, for a one-year term share account, a credit union could make monthly dividend payments that are equal to 1/12 of the amount of dividends that will be earned for a 365-day period (or 11 uniform monthly payments--each equal to roughly 1/12 of the total amount of dividends--and one payment that accounts to the remainder of the total amount of dividends earned for the period).

4. Leap year. Credit unions may apply a daily rate of 1/366 or 1/365 of the dividend rate for 366 days in a leap year, if the account will earn dividends for February 29.

5. Maturity of term share accounts. Credit unions are not required to pay dividends after term share accounts mature. Examples include:

i. During any grace period offered by a credit union for an automatically renewable term share account, if the member decides during that period not to renew the account.

ii. Following the maturity of nonrollover term share accounts.

iii. When the maturity date falls on a holiday, and the member must wait until the next business day to obtain the funds.

6. Dormant accounts. Credit unions must pay dividends on funds in an account, even if inactivity or the infrequency of transactions would permit the credit union to consider the account to be 'inactive' or 'dormant' (or similar status) as defined by state or other law or the account contract.

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7. Insufficient funds. Credit unions are not required to pay dividends on checks or share drafts deposited to a member's account that are returned for insufficient funds. If a credit union accrues dividends on a check that it later determines is not good, it may deduct from the accrued dividends any dividends attributed to the proceeds of the returned check. If dividends have already been credited before the credit union determines the item has insufficient funds, the credit union may deduct the amount of the check and associated dividends from the account balance. The amount deducted will not be reflected in the dividend amount and annual percentage yield earned reported for the next period.

8. Account drawn below par value of a share. If a member draws his or her account below the par value of a share, dividends would continue to accrue on the account so long as any minimum balance requirement is met. However, under the NCUA Standard FCU Bylaws, if a member who reduces his or her share balance below the value of a par value share and does not increase the balance within at least six months, the credit union may terminate the member's membership. State-chartered credit unions may have similar termination provisions.

(a)(2) Determination of Minimum Balance to Earn Dividends

1. General. Credit unions may set minimum balance requirements that must be met in order to earn dividends. However, credit unions must use the same method to determine a minimum balance required to earn dividends as they use to determine the balance upon which dividends will accrue and pay. For example, a credit union that calculates dividends on the daily balance method must use the daily balance method to determine if the minimum balance to earn dividends has been met. Similarly, a credit union that calculates dividends on the average daily balance method must use the average daily balance method to determine if the minimum to earn dividends has been met. Credit unions may have a par value of a share that is different from the minimum balance requirement to earn dividends. (See commentary to Sec. 707.4(b)(3)(i)).

2. Daily balance accounts. Credit unions that require a minimum balance to earn dividends may choose not to pay dividends for days when the balance drops below the required minimum balance if they use the daily balance method to calculate dividends. For example, a credit union could set a minimum daily balance level of $200 and pay dividends only those days the $200 daily balance is maintained.

3. Average daily balance accounts. Credit unions that require a minimum

balance to earn dividends may choose not to pay dividends for the average daily balance calculation period in which the average daily balance drops below the required minimum, if they use the average daily balance method to calculate dividends. For example, a credit union could set a minimum average daily balance level of $200 and pay dividends only if the $200 average daily balance is met for the calculation period.

4. Beneficial method. Credit unions may not require members to maintain both a minimum daily balance and a minimum average daily balance to earn dividends, such as by requiring the member to maintain a $500 daily balance and a prescribed average daily balance (whether higher or lower). But a credit union could offer a minimum balance to earn dividends that includes an additional method that is 'unequivocally beneficial' to the member such as the following:

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i. A credit union using the daily balance method to calculate dividends and requiring a $500 minimum daily balance could choose to pay dividends on the account (for those days the minimum balance is not met) as long as the member maintained an average daily balance throughout the month of $400.

ii. A credit union using the average daily balance method to calculate dividends and requiring a $400 minimum average daily balance could choose to pay dividends on the account as long as the member maintained a daily balance of $500 for at least half of the days in the period.

iii. A credit union using either the daily balance method or average daily balance method to calculate dividends that requires: (A) a $500 daily balance; or (B) a $400 average daily balance to pay dividends on the account.

5. Paying on full balance. Credit unions must pay dividends on the full balance in the account that meets the required minimum balance. For example, if $300 is the minimum daily balance required to earn dividends, and a member deposits $500, the credit union must pay the stated dividend rate on the full $500 and not just on the $200.

6. Negative balances prohibited. Credit unions must treat a negative account balance as zero to determine:

i. The daily or average daily balance on which dividends will be paid.

ii. Whether any minimum balance to earn dividends is met. (See commentary to Appendix A, Part II, which prohibits credit unions from using negative balances in calculating the dividends figure for the annual percentage yield earned.)

7. Club accounts. Credit unions offering club accounts (such as a 'holiday' or 'vacation' club accounts) cannot impose a minimum balance requirement for dividends based on the total number or dollar amount of payments required under the club plan. For example, if a plan calls for $10 weekly payments for 50 weeks, the credit union cannot set a $500 minimum balance and then pay only if the member makes all 50 payments.

8. Minimum balances not affecting dividends. Credit unions may use the daily balance, average daily balance, or other computation method to calculate minimum balance requirements not involving the payment of dividends--such as to compute minimum balances for assessing fees.

(b) Compounding and Crediting Policies

1. General. Credit unions choosing to compound dividends may compound or credit dividends annually, semi-annually, quarterly, monthly, daily, continuously, or on any other basis.

2. Withdrawals prior to crediting date. If members withdraw funds (without closing the account), prior to a scheduled crediting date, credit unions may delay paying the accrued dividends on the withdrawn amount until the scheduled

payable daily according to the deposit contract. Dividend rates are prospective until actually declared; interest rates are set according to contract in advance and are earned on that basis. Share accounts establish a member (owner)/credit union (cooperative) relationship; deposit accounts establish a depositor (creditor)/depository (debtor) relationship.

3. Referencing. Except where specifically stated otherwise, use of the terms 'dividend' or 'dividends' in part 707 also refers to 'interest' where appropriate (for interest-bearing and non-interest-bearing deposit accounts at some state-chartered credit unions).

(q) Member

1. Professional capacity. Examples of accounts held by a natural person in a professional capacity for another are:

i. Attorney-client trust accounts.

ii. Trust, estate and court-ordered accounts.

iii. Landlord-tenant security accounts.

2. Other accounts. Examples of accounts not held in a professional capacity include accounts held by parents for a child under the Uniform Gifts to Minors Act (or Uniform Transfers to Minors Act.

3. Retirement plans. IRAs and SEP accounts are member accounts to the extent that funds are invested in accounts subject to the regulation. Keogh accounts, like sole proprietor accounts, are not subject to the regulation.

(r) Non-Dividend Membership Benefits

1. General. Term reflects unique credit union practices that are difficult to value, encourage community spirit, and are not granted in such quantity as to be includable as calculable dividends.

2. Examples. Examples include:

i. Food, refreshments, and drawings and raffles at annual meetings, member functions, and branch openings.

ii. Travel club benefits.

iii. Prizes offered at annual meetings, such as U.S. Savings Bonds, a deposit of funds into the winner's account, trips, and other gifts. Such prizes are not bonuses because they are offered as an incentive to increase attendance at the annual meeting, and not to entice members to open, maintain, or renew accounts or increase an account balance.

iv. Life savings benefits.

(s) Passbook Account

1. Relation to Regulation E. Passbook accounts include accounts accessed by preauthorized electronic fund transfers to the account (as defined in 12 CFR Sec. 205.2(j)), such as an account credited by direct share and deposit of social security payments. Accounts that permit access by other electronic means are not 'passbook accounts,' and any statements that are sent four or more times a year must comply with the requirements of Sec. 707.6.

(t) Periodic Statement

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1. General. Periodic statements are not required by part 707. Passbook and term share accounts are exempt from periodic statement requirements.

2. Examples. Periodic statements do not include:
i. Additional statements provided solely upon request.
ii. Information provided by computer through home electronic credit union account services.
iii. General service information such as a quarterly newsletter or other correspondence that describes available services and products.

(u) Potential Member

1. General. A potential member is a natural person eligible for membership in a credit union, who has not yet taken the steps necessary to become a member. The term also includes natural person nonmembers eligible to hold accounts in a credit union pursuant to relevant federal or state law.
2. Verification of eligibility. It is recommended that credit unions have sound written procedures in place to identify those eligible for membership. If these procedures include verification measures, such as an application process, verification telephone call or letter to an employer or association within the field of membership, witnessing by an existing member, or similar procedure, then the credit union may first verify the membership eligibility of a potential member before providing account disclosures or other information to the potential member. This process of verifying a member's eligibility status, making a recommendation for membership, and providing account disclosures should be completed within 20 calendar days. This period also applies when potential members not on credit union premises request disclosures.
3. Nonmembers. Within its sole discretion, the board of directors of a credit union may provide TISA disclosures to nonmembers who are ineligible for membership or to hold an account at the credit union. If disclosures are made to such nonmembers, it is the position of the Board that no civil liability can accrue to the credit union for any errors in such disclosures. (See commentary to Sec. 707.3(d)).

(v) State

1. General. Territories and possessions include American Samoa, Guam, the Mariana Islands, and the Marshall Islands.

(w) Stepped-Rate Account

1. General. Stepped-rate accounts are those accounts in which two or more dividend rates (known at the time the account is opened) will take effect in succeeding periods.
2. Example. An example of a stepped-rate account is a one-year term share certificate account in which a 5.00% dividend rate is paid for the first six months, and 5.50% for the second six months.

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(x) Term Share Account

1. Relation to Regulation D. Regulation D permits, in limited circumstances, the withdrawal of funds without penalty during the first six days after a 'time deposit' is opened. (See 12 CFR 204.2(c)(1)(i).) But the fact that a member makes a withdrawal as permitted by Regulation D does not disqualify the account

from being a term share account for purposes of this regulation (such as withdrawals upon the death of the member, or within a 'grace period' for automatically renewable term share accounts).

2. Club accounts. Club accounts, including Christmas club, holiday club, and vacation club accounts may be either term share or regular share accounts, depending on the terms of the account. Although club accounts typically have a maturity date, they are not term share accounts unless they also require a penalty of at least seven days' dividends for withdrawals during the first six days after the account is opened.

(y) Tiered-Rate Account

1. General. Tiered-rate accounts are those accounts in which two or more dividend rates are paid on the account and are determined by reference to a specified balance level. Tiered-rate accounts are of two types: Tiering Method A and Tiering Method B. In Tiering Method A accounts, the credit union pays the applicable tiered dividends rate on the entire amount in the account. This method is also known as the 'hybrid' or 'plateau' tiered-rate account. In Tiering Method B accounts, the credit union does not pay the applicable tiered dividends rate on the entire amount in the account, but only on the portion of the share account balance that falls within each specified tier. This method is also known as the 'pure' or 'split-rate' tiered-rate account. (See Appendix A, part I, D.)

2. Example. An example of a tiered-rate account is one in which a credit union pays a 5.00% dividend rate on balances below $1,000, and 5.50% on balances $1,000 and above.

3. Term share accounts. Term share accounts that pay different rates based solely on the amount of the initial share and deposit are not tiered-rate accounts.

4. Minimum balance accounts. A requirement to maintain a minimum balance to earn dividends does not make an account a tiered-rate account. If dividends are not paid on amounts below a specified balance level, then the account has a minimum balance requirement (required to be disclosed under Sec. 707.4(b)(3)(i)), but the account does not constitute a tiered-rate account. A zero rate (0%) cannot constitute a tier. Minimum balance accounts are single rate accounts with a minimum balance requirement.

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(z) Variable-Rate Account

1. General. Includes accounts in which the credit union does not contract to give at least 30 days advance written notice of decreases in the dividend rate. An account meets this definition whether the rate change is determined by reference to an index, by use of a formula, or merely at the discretion of the credit union's board of directors. An account that permits one or more rate adjustments prior to maturity at the member's option, such as a rate relock option, is a variable-rate account.

2. Differences between fixed-rate and variable-rate accounts. All accounts must either be fixed-rate or variable-rate accounts. Classifying an account as variable-rate affects credit unions three ways:

i. Additional account disclosures are required (s 707.4(b)(1)(ii));

ii. Rate decreases are exempted from change-in-terms requirements (s

707.5(a)(2)(i)); and

iii. Advertising notice required (s 707.8(c)(1)).

Fixed-rate accounts require a contract term obligating the credit union to a 30-day advance, written notice to members before decreasing the dividend rate on the account. Term changes adversely affecting the member and rate decreases cannot take effect until 30 days after such fixed-rate change-in-terms notices are mailed or delivered to members (s 707.5(a)).

Section 707.3--General Disclosure Requirements

(a) Form

1. General. All required disclosures (e.g., account disclosures, change-in-terms notices, term share renewal/maturity notices, statement disclosures and advertising disclosures) must be made clearly and conspicuously, in a form the member may retain. Disclosures need be made only as applicable (e.g., disclosures for a non-dividend-bearing account would not include disclosure of annual percentage yield, dividend rate, or other disclosures pertaining to dividend calculations).

2. Design requirements. Disclosures must be presented in a format that allows members and potential members to readily understand the terms of their account. Credit unions are not required to use a particular type size or typeface, nor are credit unions required to state any term more conspicuously than any other term. Disclosures may be made:

i. In any order.

ii. In combination with other disclosures or account terms.

iii. In combination with disclosures for other types of accounts, as long as it is clear to members and potential members which disclosures apply to their account.

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iv. On more than one page and on the front and reverse sides.

v. By using inserts to a document or filling in blanks.

vi. On more than one document, as long as the documents are provided at the same time.

3. Consistent terminology. A credit union must use the same terminology to describe terms or features that are required to be disclosed. For example, if a credit union describes a monthly fee (regardless of account activity), as a 'monthly service fee' in account opening disclosures, the periodic statements and change-in-terms notices must use the same terminology so that members and potential members can readily identify the fee.

(b) General

1. Terms and conditions. Credit unions are required to have disclosures reflect the terms of the legal obligation between the credit union and a member at the time the member opens the account. This provision does not impose any contract terms or supersede state or other laws that define how the legal obligations between a credit union and its membership are determined.

2. Specificity of legal obligation. Credit unions may refer to the calendar month or to roughly equivalent intervals during a calendar year as a 'month.' Use of estimates is prohibited in TISA disclosures.

3. Foreign language. Disclosures may be made in any foreign language, if desired by the board of directors of a credit union. However, disclosures must also be provided in English, upon request.

(c) Relation to Regulation E

1. General rule. Compliance with Regulation E (12 CFR part 205) is deemed to satisfy the disclosure requirements of this regulation, such as when:

i. A credit union changes a term that triggers a notice under Regulation E, and the timing and disclosure rules of Regulation E for sending change-in-terms notices.

ii. A member adds an ATM access feature to an account, and the credit union provides disclosures pursuant to Regulation E, including disclosure of fees before the member receives ATM access. (See 12 CFR 205.7.)

iii. A credit union complying with the timing rules of Regulation E discloses at the same time fees for electronic services (such as balance inquiry fees imposed if the inquiry is made at an ATM) that are required to be disclosed by this regulation, but not by Regulation E.

iv. A credit union relies on Regulation E's rules regarding disclosures of limitations on the frequency and amount of electronic fund transfers, including security-related exceptions. But any limitation on the number of 'intra-institutional transfers' to or from the member's other accounts at the credit union during a given time period must be disclosed, even though intra-institutional transfers are exempt from Regulation E.

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(d) Multiple Members

1. General. When an account has multiple natural person member accountholders, delivery of disclosures to any member accountholder or agent authorized by the accountholder satisfies the disclosure requirements of part 707.

(e) Oral Response to Inquiries

1. Application of rule. Credit unions need not provide rate information orally. Disclosures need be made only as appropriate. For example, the requirement to give a telephone number for a member to call about rates for interest-bearing accounts and dividend-bearing term share accounts, would not be necessary for members calling the credit union for information. Also, the disclosure requirements are applicable only to credit union employees and volunteers acting in the ordinary course of credit union business.

2. Relation to advertising. The advertising rules do not cover an oral response to a question about rates.

3. Existing accounts. This paragraph does not apply to oral responses about rate information for existing term share accounts or accounts not currently offered. For example, if a member holding a one-year term share account requests dividend rate information about the account during the term, the credit union need not disclose the annual percentage yield, unless the member is calling for rate information under a maturity notice.

(f) Rounding and Accuracy Rules for Rates and Yields

(f)(1) Rounding

1. Permissible rounding. The annual percentage yield, annual percentage yield earned and dividend rate must be rounded to the nearest one-hundredth of one percentage point (.01%) when disclosed. Examples of permissible rounding are an annual percentage yield calculated to be 5.644%, rounded down and shown as 5.64%; 5.645% would be rounded up and disclosed as 5.65%. For account disclosures, the dividend rate may be expressed to more than two decimal places.

(f)(2) Accuracy

1. Annual percentage yield and annual percentage yield earned. The tolerance for annual percentage yield and annual percentage yield earned calculations is designed to accommodate inadvertent errors. Credit unions may not purposely incorporate the one-twentieth of one percentage point (.05%) tolerance into their calculation of yields.
2. Dividend rate. There is no tolerance for an inaccuracy in the dividend rate.

Section 707.4--Account Disclosures

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(a) Delivery of Account Disclosures

(a)(1) Account Opening

1. New accounts. New account disclosures must be provided when:
i. A term share account that does not automatically rollover is renewed by a member.
ii. A member changes the term for a renewable term share account (from a one-year term share account to a six-month term share account, for instance) (see comment 5(b)-5 regarding disclosure alternatives).
iii. A credit union transfers funds from an account to open a new account not at the member's request, unless the credit union previously gave account disclosures and any change-in-terms notices for the new account (e.g., funds in a money market share account are transferred by a credit union to open a new account for the member, such as a share draft account, because the member exceeded transaction limitations on the money market share account).
iv. A credit union accepts a deposit from a member to an account that the credit union had previously deemed to be 'closed,' under applicable federal or state law, for the purpose of treating accrued, but uncredited, dividends as forfeited dividends. New account numbers are not required by this requirement.
2. Acquired accounts. New account disclosures need not be given when a credit union acquires an account through an acquisition of, or merger with, another credit union (but see Sec. 707.5(a) regarding advance notice requirements if terms are changed).
3. Combination disclosures. New account disclosures need not be given when a member has already received disclosures covering several accounts, and opens a new account properly disclosed by the already received combination disclosures, if the new account is opened within a reasonable amount of time after receipt of the combination disclosures and if the received disclosures and terms are accurate at the time the new account is opened.

(a)(2) Requests

(a)(2)(i)

1. Inquiries versus requests. A response to an oral inquiry (by telephone or in person) about rates and yields or fees does not trigger the duty to provide account disclosures. But, when a member asks for written information about an account (whether by telephone, in person, or by other means), the credit union must provide disclosures unless the account is no longer offered to the public.

2. General requests. When member's or potential member's request disclosures about a type of account (a share draft account, for example), a credit union that offers several variations may provide disclosures for any one of them. No disclosures need be made to nonmembers, though a credit union may provide disclosures to nonmembers within its sole discretion.

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3. Timing for response. Twenty calendar days is a reasonable time for responding to a request for account information that a member does not make in person.

(a)(2)(ii)(A)(2)

1. Recent rates. Credit unions comply with this paragraph if they disclose an interest rate (or dividend rate on a dividend-bearing term share account) and annual percentage yield accurate within the seven calendar days preceding the date they send the disclosures.

(a)(2)(ii)(B)

1. Term. Describing the maturity of a term share account as '1 year' or '6 months,' for example, illustrates a response stating the maturity of a term share account as a term rather than a date (e.g., 'June 1, 1995').

(b) Content of Account Disclosures

(b)(1) Rate Information

(b)(1)(i) Annual Percentage Yield and Dividend Rate

1. Rate disclosures. In addition to the dividend rate and annual percentage yield, credit unions may disclose a periodic rate corresponding to the dividend rate. No other rate or yield (such as 'tax effective yield') is permitted. If the annual percentage yield is the same as the dividend rate, credit unions may disclose a single figure but must use both terms.

2. Fixed-rate accounts. For fixed-rate term share accounts paying the opening rate until maturity, credit unions may disclose the period of time the dividend rate will be in effect by stating, or cross-referencing, the maturity date. For other fixed-rate accounts, credit unions may use a date (such as 'This rate will be in effect through June 30, 1995') or a period (such as 'This rate will be in effect for at least 30 days').

3. Tiered-rate accounts. Each dividend rate, along with the corresponding annual percentage yield for each specified balance level (or range of annual percentage yields, if appropriate), must be disclosed for tiered-rate accounts. (See Appendix A, Part I, Paragraph D.)

3. Other investments. The term 'account' does not apply to these products. Examples of products not covered are:

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i. Government securities.
ii. Mutual funds.
iii. Annuities.
iv. Securities or obligations of a credit union.
v. Contractual arrangements such as repurchase agreements, interest rate swaps, and bankers acceptances.
vi. Purchases of U.S. Savings Bonds through a credit union.
vii. Services offered through a group purchasing plan or a credit union service organization (CUSO).

4. Options. All dividend-bearing and interest-bearing accounts are either fixed-rate or variable-rate accounts.

5. Use of synonyms. Generally, it is not the purpose of part 707 to prohibit specific descriptive terms for accounts. For example, credit unions can use adjectives and trade names to describe accounts such as 'Best Share Draft Account,' or 'Ultra Money Market Share Account.' Synonyms for share, share draft, money market share, and term share accounts may be used to describe various types of credit union share and deposit accounts as long as the synonym is accurate and not misleading and, for account disclosures, is used in conjunction with the correct legal term. For example, the following synonyms may be used:

i. The term 'checking account' may be used to describe share draft accounts.
ii. The term 'money market account' may be used to describe money market share accounts.
iii. The term 'savings account' may be used to describe regular share and share accounts.
iv. The terms 'share certificate,' 'certificate account,' or 'certificate' may be used to describe share certificates and other dividend-bearing term share accounts.
v. However, under no circumstances may a credit union describe a share account as a deposit account, or vice versa. For example, the term 'certificate of deposit' or 'CD' may not be used to describe share certificates and other dividend-bearing term share accounts. Similarly, the terms 'time account' (used in Regulation DD, 12 CFR 230.2(u)) and 'time deposit' (used in Regulation D, 12 CFR 204.2(c)) may not be used to describe term share accounts.

(b) Advertisement

1. Covered messages. Advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to members and potential members the availability of member accounts such as:

i. Telephone solicitations.

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ii. Messages on automated teller machine (ATM) screens (including any printout).
iii. Messages on a computer screen in a credit union's lobby (including any printout) other than a screen viewed solely by the credit union's employee.
iv. Messages in a newspaper, magazine, or promotional flyer or on radio or television.
v. Messages promoting an account that are provided along with information about the member's existing account at a credit union and that promote another

account at the credit union (such as account promotional messages on the periodic statement).

2. Other messages. Examples of messages that are not advertisements are:

i. Rate sheets published in newspapers, periodicals, or trade journals (unless the credit union or share and deposit broker that offers accounts at the credit union pays a fee to have the information included or otherwise controls publication).

ii. Telephone conversations initiated by a member or potential member about an account.

iii. An in-person discussion with a member about the terms for a specific account.

iv. Information provided to members about their existing accounts, such as on IRA disbursements, notices for automatically renewable term share accounts sent before renewal, or current rates recorded on a voice response machine.

(c) Annual Percentage Yield.

1. General. The annual percentage yield (APY) is required for disclosures for new accounts, oral responses to inquiries about rates; disclosures provided upon request; initial disclosures (if the credit union chooses to provide full disclosures instead of the abbreviated notice); notices prior to the renewal of a term share account, if known at the time the notice is sent, and in advertising. The annual percentage yield shows the total amount of dividends for a 365 day period (or a 366 day period for a leap year) on an assumed principal amount based on the dividend rate and frequency of compounding as a percentage of the assumed principal (for accounts such as share or share draft accounts) or for the total amount of dividends over the term of the account for term share accounts. The annual percentage yield assumes the principal amount remains in the account for 365 days (366 days for leap year) or for the term of the account.

2. How Annual Percentage Yield Differs from Annual Percentage Yield Earned. The annual percentage yield (APY) differs from the annual percentage yield earned (APYE). The annual percentage yield earned is required for periodic statements only. The annual percentage yield earned shows the total amount of dividends earned for the dividend or statement period as a percent of the actual average daily balance in the member's account. Unlike the annual percentage yield, the annual percentage yield earned is affected by additions and withdrawals during the period. The annual percentage yield and the annual percentage yield earned must be calculated according to the formulas provided in Appendix A to this rule.

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(d) Average Daily Balance Method

1. General. One of the two required methods (the daily balance is the other) of determining the balance upon which dividends must be accrued and paid. The average daily balance method requires the application of a periodic rate to the average daily balance in the account for the average daily balance calculation period. The average daily balance is determined by adding the full amount of principal in the account for each day of the period and dividing that figure by the number of days in the period.

(e) Board.

1. General. The NCUA Board.

(f) Bonus

1. General. Bonuses include items of value offered as incentives to members, such as an offer to pay the final installment deposit for a holiday club account if the final installment is over $10. Bonuses do not include the payment of dividends (including extraordinary dividends), the waiver or reduction of a fee, the absorption of expenses, non-dividend membership benefits, or other consideration aggregating $10 or less per year.

2. Examples. The following are examples of bonuses.

i. A credit union offers $25 to potential members for becoming a member and opening an account. The $25 could be provided by check, cash, or direct deposit.

ii. A credit union offers $25 to a member with only a regular share account to open a share draft account. The $25 could be provided by check, cash, or direct deposit.

iii. A credit union offers a portable radio with a value of $20 to members and potential members for opening a share draft account.

iv. A credit union pays the final installment deposit for a holiday club account if over $10.

3. Examples not comprising bonuses. The following are examples of items that are not bonuses:

i. Discount coupons distributed by credit unions for use at restaurants or stores.

ii. A credit union offers $20 to any member if the member is responsible for encouraging a potential member to open an account. The $20 is not a bonus because the $20 is not paid to the individual opening the account. Any item, including cash, given or offered to a third party (that is not a joint member or joint owner in an account being opened) in exchange for a member or potential member opening (or a member renewing or adding to) an account is not a bonus.

iii. A credit union offers $25 to a member if the member can locate his name in the body of a newsletter.

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iv. Life savings benefits. Many credit unions offer life savings benefits to beneficiaries of deceased members. Because the benefit accrues to a third party, such life savings plans offered are not bonuses.

v. A credit union offers to pay annual membership dues in a benevolent organization for a class of members.

4. De minimis rule. Items with a de minimis value of $10 or less are not bonuses. Credit unions may rely on the valuation standard used by the Internal Revenue Service (IRS) to determine if the value of the item is de minimis. Items required to be reported by the credit union under IRS rules are bonuses under this regulation. Examples of items of de minimis values are:

i. Disability insurance premiums on a share account valued at an amount of $10 or less per year.

ii. Coffee mugs, T-shirts or other merchandise with a market value of $10 or less per year.

5. Aggregation. In determining if an item valued at $10 or less is a bonus, credit unions must aggregate per account per calendar year items that may be given to members. In making this determination, credit unions aggregate per account only the market value of items that may be given for a specific

promotion. To illustrate, assume a credit union offers in January to give members an item valued at $7 for each calendar quarter during the year that the average account balance in a share draft account exceeds $10,000. The bonus rules are triggered, since members are eligible under the promotion to receive up to $28 during the year. However, the bonus rules are not triggered if an item valued at $7 is offered to members opening a share draft account during the month of January, even though in November the credit union introduces a new promotion that includes, for example, an offer to existing share draft accountholders for an item valued at $8 for maintaining an average balance of $5,000 for the month.

6. Waiver or reduction of a fee or absorption of expenses. Bonuses do not include value received by members through the waiver or reduction of fees for credit union-related services (even if the fees waived exceed $10), such as the following:

i. Waiving a safe deposit box rental fee for one year for members who open a new account.

ii. Waiving fees for travelers checks for members, and waiving check and share draft printing fees.

iii. Nondiscriminatorily waiving all fees for a particular class of members, such as seniors or minors.

iv. Discounts on interest rates charged for loans at the credit union.

v. Rebates of loan interest already paid by a member.

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vi. Discounts on application fees charged for loans at the credit union.

vii. Packaged, linked, or tied-account services.

7. Non-dividend membership benefits. Such benefits are not bonuses because they are sporadic in nature, often difficult to value, and providing non-dividend membership benefits is a long-standing unique credit union practice. (See commentary to Sec. 707.2(r) for examples of such benefits.)

(g) Credit Union

1. General. Includes credit unions in the United States, Puerto Rico, Guam, U.S. Virgin Islands, and U.S. territories. Applies to credit unions whether or not the accounts in the credit union are federally, state, privately insured, or uninsured.

(h) Daily Balance Method

1. General. One of the two required methods (the average daily balance is the other) of determining the balance upon which dividends must be accrued and paid. The daily balance method requires the application of a daily periodic rate to the full amount of principal in the account each day.

(i) Dividend and Dividends

1. General. Member savings placed in share accounts are equity investments, and the returns earned on these accounts are dividends. Federal credit unions may only offer dividend-bearing and non-dividend-bearing share accounts. State-chartered credit unions may offer both share and deposit accounts if permitted by state law. State law, including without limitation regulations and official interpretations, will determine if returns earned in accounts in state-chartered credit unions are dividends. Dividends exclude the payment of a bonus or other consideration worth $10 or less given during a year, the waiver

or reduction of a fee, the absorption of expenses, non-dividend membership benefits and extraordinary dividends. Dividend-bearing accounts must be either fixed-rate or variable-rate accounts.

2. Procedure. Credit unions must follow appropriate law (state law for state-chartered credit unions and federal law for federal credit unions) in determining dividend policies and declaring dividends. Generally, dividends may be viewed as a portion of the available account and undivided earnings of the credit union which is set apart, after required transfer to reserves, by valid act of the board of directors, for distribution among the members. As a matter of legal procedure, members are usually not entitled to dividends until the following steps are completed: (1) The board of the credit union develops a nondiscriminatory dividend policy, by establishing dividend periods, dividend credit determination dates dividend distribution dates, any associated penalties (if applicable), and the method of dividend computation for each type of share account; (2) the provisions for required transfers to reserves are made; (3) sufficient and available prior and/or current earnings are available at the end of the dividend period; (4) the board formally makes a dividend declaration in accordance with the credit union's dividend policy; and (5) dividends must be paid to members by a credit to the appropriate share account, payment by check or share draft, or by a combination of the two methods.

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3. When available. Credit unions must follow the law of their primary chartering authority to determine when dividends are available. Generally, it is the declaration of the dividend itself which creates the dividend and the member has no right to receive a dividend until it is so declared. The decision of when to declare dividends lies within the official discretion of each credit union's board of directors and cannot be abrogated by contract. An agreement to pay dividends on a share account is generally interpreted not as an obligation to pay the stipulated dividends absolutely and unconditionally, but as an undertaking to pay them out of the earnings when sufficiently accumulated from which dividends in general are properly payable. Generally, 'prospective rates' are rates set in good faith in advance of the close of a dividend period, that may be altered if sufficient funds are not available, or in the event of a superseding event, such as a strike, plant closure, significant fluctuation in market rates and/or a significant change in financial structure, natural disaster or emergency that alters the assumptions under which the 'prospective rates' were made. It is the intent of TISA that all disclosure be accurate when made, and credit unions are urged to make every effort to ratify disclosed 'prospective rates.' 'Prospective rates' may also be referred to as 'projected rates' or similar wording, but not as 'estimated rates.' (See comment 3(b)-2, prohibiting use of estimates).

4. Sample dividend resolutions. (i) The following resolution may be used where the dividend rates are set after the close of a dividend period.

Resolution of Board of Directors for the Declaration of Dividends

A. I, _____, certify that I am Secretary of _____ Credit Union Board of Directors, and that the following is a correct copy of the resolution for declaring dividend adopted by the _____ Credit Union at a meeting of the Board of Directors duly and properly held on _____, 19___. This resolution appears in the minutes of this meeting and has not been rescinded or modified.

B. Resolved, that

(1) The Board of Directors has developed a nondiscriminatory dividend policy, by establishing dividend periods, dividend credit determination dates,

dividend distribution dates, any associated penalties (if applicable), and the method of dividend computation for each type of share account;

(2) The required transfers to reserves have been made; and

(3) Sufficient and available prior and/or current earnings are available at the end of this dividend period.

C. Resolved, further, that the Board of Directors now formally makes a dividend declaration in accordance with the Credit Union's dividend policy and authorizes that on _____, 19___, dividends must be paid to members by a credit to the appropriate share account, payment by share draft or by a combination of the two methods.

D. I further certify that the Board of Directors of this Credit Union has, and the time of adoption of this resolution had, full power and lawful authority to adopt the foregoing resolutions and that this resolution revokes any prior resolution.

In witness whereof, this is my signature and the date on which I signed this Resolution.

___

Signature

___

Date

[Attach list of accounts with dividend rates for each type of account.]

(ii) The following resolution may be used where the dividend rates are set before the close of a dividend period.

Resolution of Board of Directors for the Declaration of Dividends

A. I, _____, certify that I am the Secretary of _____ Credit Union, and that the following is a correct copy of the resolution for declaring dividends adopted by the _____ Credit Union at a meeting of the Board of Directors duly and properly held on _____, 19_____. This resolution appears in the minutes of that meeting and has not been rescinded or modified.

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B. Resolved, that the Board of Directors has adopted a nondiscriminatory dividend policy, by establishing dividend periods, dividend credit determination dates, dividend distribution dates, any associated penalties (if applicable) and the method of dividend computation for each type of share account.

C. Resolved, that it is the policy and practice of the Board of Directors to meet periodically to establish prospective dividend rates for each type of dividend-bearing share account.

D. Resolved, that if the required transfers to reserves have been made and there are sufficient and available prior and/or current earnings available at the end of a dividend period, the officers of the Credit Union are authorized to pay dividends at the rate prospectively established by the Board of Directors for each account for the dividend period. The officers may pay the dividends without any further action of the Board of Directors. The act of paying the dividends shall constitute the declaration of the dividends and shall be a ratification of the prospective dividend rate.

In witness whereof, this is my signature and the date on which I signed this Resolution.

___

Signature

___

Date

[Attach list of accounts with prospective dividend rates for each type of account.]

5. Referencing. Except where specifically stated otherwise, use of the term 'share' in part 707, as in 'share account,' also refers to 'deposit,' as in 'deposit account,' where appropriate (for interest-bearing or non-interest-bearing deposit accounts at some state-chartered credit unions).

(j) Dividend Declaration Date

1. General. The importance of the dividend declaration date is to tie the last paid dividend to a certain period of time to place members and potential members on notice that the last paid dividend is different from the next dividend to be paid. In order to achieve this purpose, a credit union may use any of the following methods:

i. 'As of 3/15/95' (the date the board of directors last met and declared the last paid dividend).

ii. 'As of 3/31/95' (the last day of the last dividend period upon which a dividend has been paid).

iii. 'For the period 1/1/95 to 3/31/95' (the last dividend period upon which a dividend has been paid).

iv. 'For the first quarter of 1995' (the last dividend period upon which a dividend has been paid).

v. 'For April 1995' (the last dividend period upon which a dividend has been paid).

vi. 'As of the last dividend declaration date' (the last dividend period upon which a dividend has been paid).

(k) Dividend Period

1. General. The dividend period is to be set by a credit union's board of directors for each account type, e.g., regular share, share draft, money market share, and term share. The most common dividend periods are weekly, monthly, quarterly, semi-annually, and annually. Dividend periods need not agree with calendar months, e.g., a monthly dividend period could begin March 15 and end April 14.

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(l) Dividend Rate

1. General. The dividend rate does not reflect compounding. Compounding is reflected in the 'annual percentage yield' definition.

2. Referencing. Except where specifically stated otherwise, use of the term 'dividend rate' in part 707 also refers to 'interest rate,' where appropriate

(for interest-bearing and non-interest-bearing deposit accounts at some state-chartered credit unions).

(m) Extraordinary Dividends

1. General. The definition encompasses all irregularly scheduled and declared dividends, and as dividends, extraordinary dividends are exempt from the 'bonus' disclosure requirements. Extraordinary dividends do not have to be disclosed on account disclosures, but the dollar amount of an extraordinary dividend credited to the account during the statement period does have to be separately disclosed on the periodic statement for the dividend period during which the extraordinary dividends are earned. Extraordinary dividends, like ordinary dividends, do not include the payment of a bonus or other consideration worth $10 or less given during a year, the waiver or reduction of a fee, the absorption of expenses or non-dividend membership benefits. See comments 2(f) 1 through 7 and 2(i) 1 through 4. Extraordinary dividends may be calculated by any means determined by the board of directors of a credit union and may not be used in the annual percentage yield earned calculation.

2. Use of synonym. Extraordinary dividends may be described as 'bonus dividends.'

(n) Fixed-Rate Account

1. General. Includes all accounts in which the credit union, by contract, agrees to give at least 30 days advance written notice of decreases in the dividend rate. Thus, credit unions can decrease rates only after providing advance written notice of rate decreases, e.g., a 'change-in-terms notice.'

(o) Grace Period

1. General. A period after maturity of an automatically renewing term share account during which the member may withdraw funds without being assessed a penalty. Use of a 'grace period' is discretionary, not mandatory. This definition does not refer to the 'grace period' account, which is a synonym for 'federal rollback method' or 'in by the 10th' accounts, which are prohibited by TISA and part 707.

(p) Interest

1. General. Member savings placed in deposit accounts are debt investments, and the return earned on these accounts is interest. Federal credit unions are not authorized to offer any interest-bearing deposit accounts. State-chartered credit unions may offer both share and deposit accounts if permitted by state law. State law, including without limitation regulations and official interpretations, will determine if returns earned in accounts in state-chartered credit unions are interest. Interest excludes the payment of a bonus or other consideration worth $10 or less given during a year, the waiver of reduction of a fee, the absorption of expenses, non-dividend membership benefits, and extraordinary dividends.

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2. Differences between dividends and interest. Generally, dividends are returns on an equity investment (shares); interest is return on a debt investment (deposits). Dividends, in general, are not properly payable until declared at the close of a dividend period; interest, in general, is properly

on 92 days and 181 days respectively. All calculations in the insert assume daily compounding.

B-6 Sample Form (Tiered-Rate Money Market Account)

1. General. Sample Form B-6 uses Tiering Method A (discussed in Appendix A and Clause (a)(iv)) to calculate interest. It gives a narrative description of a tiered-rate account; institutions may use different formats (for example, a chart similar to the one in Sample Form B-4), as long as all required information for each tier is clearly presented. The form does not contain a separate disclosure of the minimum balance required to obtain the annual percentage yield; the tiered-rate disclosure provides that information.

[59 FR 40221, Aug. 8, 1994; 59 FR 52658, Oct. 19, 1994]

<<PART 230--TRUTH IN SAVINGS (REGULATION DD)>>

Source: 57 FR 43376, Sept. 21, 1992, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER V--OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF THE TREASURY
PART 544--CHARTER AND BYLAWS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix to Part 544 --Model Bylaws for Mutual Savings Associations

1. Annual meeting of members. The annual meeting of the members of the association for the election of directors [trustees] and for the transaction of any other business of the association shall be held, as designated by the board of directors [trustees], at a location within the state that constitutes the principal place of business of the association at (insert date and time within 120 days after the end of the association's fiscal year), if not a legal holiday, or if a legal holiday then on the next succeeding day not a legal holiday. The annual meeting may be held at such other times on such day or at such other place in the same state as the board of directors [trustees] may determine. At each annual meeting, the officers shall make a full report of the financial condition of the association and of its progress for the preceding year and shall outline a program for the succeeding year.

2. Special meetings of members. Special meetings of the members of the association may be called at any time by the president or the board of directors [trustees] and shall be called by the president, a vice president, or the secretary upon the written request of members of record, holding in the aggregate at least one-tenth of the capital of the association. Such written request shall state the purpose of the meeting and shall be delivered at the principal place of business of the association addressed to the president. Annual and special meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order.

3. Notice of meeting of members. (a) Notice of each annual meeting shall be either published once a week for the two successive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such annual meeting shall convene, in a newspaper printed in the English language and of general circulation in the city or county in which the principal place of business of the association is located, or mailed postage prepaid at least (insert number no less than 15) days and not more than (insert number not more than 45) days prior to the date on which such annual meeting shall convene, to each of its members of record at the last address appearing on the books of the association. Such notice shall state the name of the association, the place of the annual meeting, the date and time when it shall convene, and the matters to be considered. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such annual meeting shall convene. If any member, in person or by authorized attorney, shall waive in writing notice of any annual meeting of members, notice thereof need not be given to such member.

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(b) Notice of each special meeting shall be either published once a week for the two consecutive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such special meeting shall convene, in a

newspaper printed in the English language and of general circulation in the city or county in which the principal place of business of the association is located, or mailed postage prepaid at least (insert number not less than 15) days and not more than (insert number not more than 45) days prior to the date on which such special meeting shall convene to each of its members of record at the member's last address appearing on the books of the association. Such notice shall state the name of the association, the purpose(s) for which the meeting is called, the place of the special meeting and the date and time when it shall convene. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such special meeting shall convene. If any member, in person or by authorized attorney, shall waive in writing notice of any special meeting of members, notice thereof need not be given to such member.

4. Fixing of record date. For the purpose of determining members entitled to notice of or to vote at any meeting of members or any adjournment thereof, or in order to make a determination of members for any other proper purpose, the board of directors [trustees] shall fix in advance a record date for any such determination of members. Such date shall be not more than 60 days nor fewer that 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The member entitled to participate in any such action shall be the member of record on the books of the association on such record date. The number of votes which each member shall be entitled to cast at any meeting of the members shall be determined from the books of the association as of such record date. Any member of such record date who ceases to be a member prior to such meeting shall not be entitled to vote at that meeting.

5. Voting by proxy. Voting at any annual or special meeting of the members may be by proxy pursuant to the rules and regulations of the Office, provided, that no proxies shall be voted at any meeting unless such proxies shall have been placed on file with the secretary of the association, for verification, prior to the convening of such meeting. All proxies with a term greater than eleven months or solicited at the expense of the association must run to the board of directors [trustees] as a whole, or to a committee appointed by a majority of such board.

6. Communication between members. Communication between members shall be subject to any applicable rules or regulations of the Office.

7. Number of directors [trustees]. The number of directors [trustees] of the association shall be _____.

8. Meetings of the board. The board of directors [trustees] shall meet regularly without notice at the principal place of business of the association at least once each month at an hour and date fixed by resolution of the board, provided that the place of meeting may be changed by the directors [trustees]. Special meetings of the board may be held at any place specified in a notice of such meeting and shall be called by the secretary upon the written request of the chairman or of three directors [trustees]. All special meetings shall be held upon at least 24 hours written notice to each director [trustee] unless notice is waived in writing before or after such meeting. Such notice shall state the place, date, time, and purposes of such meeting. A majority of the authorized directors [trustees] shall constitute a quorum for the transaction of business. The act of a majority of the directors [trustees] present at any meeting at which there is a quorum shall be the act of the board. Action may be taken without a meeting if unanimous written consent is obtained for such action. The board may also permit telephonic participation at meetings. The meetings shall be under the direction of a chairman, appointed annually by the board, or in the absence of the chairman, the meetings shall be under the direction of the president.

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9. Officers, employees, and agents. Annually at the meeting of the board of directors [trustees] of the association next following the annual meeting of the members of the association, the board shall elect a president, one or more vice presidents, a secretary, and a treasurer: Provided, that the offices of president and secretary may not be held by the same person and a vice president may also be the treasurer. The board may appoint such additional officers, employees, and agents as it may from time to time determine. The term of office of all officers shall be one year or until their respective successors are elected and qualified; but any officer may be removed at any time by the board.In the absence of designation from time to time of powers and duties by the board, the officers shall have such powers and duties as generally pertain to their respective offices.

Any indemnification by the association of the association's personnel is subject to any applicable rules or regulations of the Office.

10. Resignation or removal of directors [trustees]. Any director [trustee] may resign at any time by sending a written notice of such resignation to the office of the association delivered to the secretary. Unless otherwise specified therein such resignation shall take effect upon receipt by the secretary. More than three consecutive absences from regular meetings of the board, unless excused by resolution of the board, shall automatically constitute a resignation, effective when such resignation is accepted by the board.

At a meeting of members called expressly for that purpose, directors [trustees] or the entire board may be removed, only with cause, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors [trustees].

11. Powers of the board. The board of directors [trustees] shall have the power:

(a) By resolution, to appoint from among its members and remove an executive committee, which committee shall have and may exercise the powers of the board between the meetings of the board, but no such committee shall have the authority of the board to amend the charter or bylaws, adopt a plan of merger, consolidation, dissolution, or provide for the disposition of all or substantially all the property and assets of the association. Such committee shall not operate to relieve the board, or any member thereof, of any responsibility imposed by law;

(b) To appoint and remove by resolution the members of such other committees as may be deemed necessary and prescribe the duties thereof;

(c) To fix the compensation of directors [trustees], officers, and employees; and to remove any officer or employee at any time with or without cause;

(d) To extend leniency and indulgence to borrowing members who are in distress and generally to compromise and settle any debts and claims;

(e) To limit payments on capital which may be accepted;

(f) To reject any application for an account or membership; and

(g) To exercise any and all of the powers of the association not expressly reserved by the charter to the members.

12. Execution of instruments, generally. All documents and instruments or writings of any nature shall be signed, executed, verified, acknowledged, and delivered by such officers, agents, or employees of the association or any one of them and in such manner as from time to time may be determined by resolution of the board. All notes, drafts, acceptances, **checks, endorsements,** and all evidences of indebtedness of the association whatsoever shall be signed by such officer or officers or such agent or agents of the association and in such manner as the board may from time to time determine. **Endorsements** for deposit

to the credit of the association in any of its duly authorized depositaries shall be made in such manner as the board may from time to time determine. Proxies to vote with respect to shares or accounts of other associations or stock of other corporations owned by, or standing in the name of, the association may be executed and delivered from time to time on behalf of the association by the president or a vice president and the secretary or an assistant secretary of the association or by any other persons so authorized by the board.

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13. Nominating committee. The chairman, at least 30 days prior to the date of each annual meeting, shall appoint a nominating committee of three persons who are members of the association. Such committee shall make nominations for directors [trustees] in writing and deliver to the secretary such written nominations at least 15 days prior to the date of the annual meeting, which nominations shall then be posted in a prominent place in the principal place of business for the 15-day period prior to the date of the annual meeting. Provided such committee is appointed and makes such nominations, no nominations for directors [trustees] except those made by the nominating committee shall be voted upon at the annual meeting unless other nominations by members are made in writing and delivered to the secretary of the association at least 10 days prior to the date of the annual meeting, which nominations shall then be posted in a prominent place in the principal place of business for the 10-day period prior to the date of the annual meeting. Ballots bearing the names of all persons nominated by the nominating committee and by other members prior to the annual meeting shall be provided for use by the members at the annual meeting. If at any time the chairman shall fail to appoint such nominating committee, or the nominating committee shall fail or refuse to act at least 15 days prior to the annual meeting, nominations for directors [trustees] may be made at the annual meeting by any member and shall be voted upon.

14. New business. Any new business to be taken up at the annual meeting, including any proposal to increase or decrease the number of directors [trustees] of the association, shall be stated in writing and filed with the secretary of the association at least 30 days before the date of the annual meeting, and all business so stated, proposed, and filed shall be considered at the annual meeting; but no other proposal shall be acted upon at the annual meeting. Any member may make any other proposal at the annual meeting and the same may be discussed and considered; but unless stated in writing and filed with the secretary 30 days before the meeting, such proposal shall be laid over for action at an adjourned, special, or regular meeting of the members taking place at least 30 days thereafter. This provision shall not prevent the consideration and approval or disapproval at the annual meeting of the reports of officers and committees, but in connection with such reports no new business shall be acted upon at such annual meeting unless stated and filed as herein provided.

15. Seal. The seal shall be two concentric circles between which shall be the name of the association. The year of incorporation, the word 'Incorporated,' or an emblem may appear in the center.

16. Amendment. Adoption of any bylaw amendment pursuant to Sec. 544.5 of the Office's regulations, as long as consistent with applicable law, rules and regulations, and which adequately addresses the subject and purpose of the stated bylaw section, shall be effective upon filing with the Office in accordance with the regulatory procedures after such amendment has been approved by a two-thirds affirmative vote of the authorized board, or by a vote of the members of the association.

17. Age limitations.--(a) Directors [trustees]. No person (fill in any age, 70 or above) years of age shall be eligible for election, reelection, appointment, or reappointment to the board of the association. No director [trustee] shall serve as such beyond the annual meeting of the association immediately following the director [trustee] becoming (fill in age used above), except that a director [trustee] serving on (fill in bylaw adoption date) may complete the term as director [trustee]. This age limitation does not apply to an advisory director [trustee].

(b) Officers. No person (fill in any age, 70 or above) years of age shall be eligible for election, reelection, appointment, or reappointment as an officer of the association. No officer shall serve beyond the annual meeting of the association immediately following the officer becoming (fill in age used above), except that an officer serving on (fill in bylaw adoption date) may complete the term. However, an officer shall, at the option of the board, retire at age _____ if the officer has served in an executive or high policy-making post for at least two years immediately prior to retirement and is immediately entitled to nonforfeitable annual retirement benefits of at least _____(must be in accordance with ERISA).

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18. Preparedness emergency bylaws.--(a) Emergency operations by surviving staff. In the event of an emergency declared by the President of the United States or the person performing his or her functions, the officers and employees of this association will continue to conduct the affairs of the association under such guidance from the directors as may be available except as to matters which by statute require specific approval of the board of directors and subject to conformance with any governmental directives during the emergency.

(b) Emergency operations by directors or members of executive committee. The board of directors shall have the power, in the absence or disability of any officer, or upon the refusal of any officer to act, to delegate and prescribe such officer's powers and duties to any other officer, or to any director, for the time being. In the event of a state of disaster of sufficient severity to prevent the conduct and management of the affairs and business of this association by its directors and officers as contemplated by these bylaws, any two or more available members of the then incumbent executive committee shall constitute a quorum of that committee for the full conduct and management of the affairs and business of the association in accordance with the provisions of Article _____ of these bylaws. In the event of the unavailability, at such time, of a minimum of two members of the then incumbent executive committee, any three available directors shall constitute the executive committee for the full conduct and management of the affairs and business of the association in accordance with the foregoing provisions of this section. This bylaw shall be subject to implementation by resolutions of the board of directors passed from time to time for that purpose, and any provisions of these bylaws (other than this section) and any resolutions which are contrary to the provisions of this section or to the provisions of any such implementary resolutions shall be suspended until it shall be determined by any interim executive committee acting under this section that it shall be to the advantage of this association to resume the conduct and management of its affairs and business under all of the other provisions of these bylaws.

(c) Officer succession. If consequent upon war or warlike damage or disaster, the president of this association cannot be located by the then acting home office or is unable to assume or to continue normal executive duties, then the authority and duties of the president shall, without further action of the board of directors, be automatically assumed by one of the following persons in

the order designated: (List of names in order of succession is shown in the official minutes of the association and in the certified copies which are under seal in various depositories.)

Any one of the above persons who in accordance with this resolution assumes the authority and duties of the president shall continue to serve until he or she resigns or until five-sixths of the other officers who are attached to the then acting home office decide in writing he or she is unable to perform said duties or until the elected president of this association, or a person higher on the above list, shall become available to perform the duties of president of the association. If consequent upon war or warlike damage or disaster, the treasurer of this association cannot be located by the then acting home office or is unable to assume or to continue normal executive duties, then the authority and duties of the treasurer shall, without further action by the board of directors, be automatically assumed by one of the following persons in the order designated: (List of names in order of succession is shown in the official minutes of the association and in the certified copies which are under seal in various depositories.)

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The person assuming the authority and duties of treasurer in accordance with this section shall serve until: (1) The elected treasurer or person whose name is higher on the above list shall be able to function as treasurer, or (2) until he or she resigns or is unable as determined by the acting president to perform the duties of his or her office. In the case of paragraph (c)(2) of this section, the next eligible and available person on the above list shall assume the authority and duties of the treasurer. Anyone dealing with this association may accept a certification by any three officers that a specified individual is acting as president or that a specified individual is acting as treasurer in accordance with this section; and that anyone accepting such certification may continue to consider it in force until notified in writing of a change, said notice of change to carry the signatures of three officers of the association.

(d) Providing for alternate locations. The offices of the association at which its business shall be conducted shall be the home office thereof located at _____ Street, _____, _____ (and branches, if any), and any other legally authorized location which may be leased or acquired by this association to carry on its business. During an emergency resulting in any authorized place of business of this association being unable to function, the business ordinarily conducted at such location shall be relocated elsewhere in suitable quarters, in addition to or in lieu of the locations heretofore mentioned, as may be designated by the board of directors or by the executive committee or by such persons as are then, in accordance with resolutions adopted from time to time by the board of directors dealing with the exercise of authority in the time of such emergency, conducting the affairs of this association. Any temporarily relocated place of business of this association shall be returned to its legally authorized locations as soon as practicable and such temporary place of business shall then be discontinued.

(e) Providing for acting home offices. In case of, and provided that, because of war or warlike damage or disaster, the Home Office of this association is unable temporarily to continue its functions, _____ Branch, located in _____, shall automatically and without further action of this board of directors, become the 'Acting Home Office of this Association'; that if by reason of said war or warlike damage or disaster, both the Home Office of this association and the said _____ Branch of this association are unable to carry on their functions, then and in such case, the _____ Branch of this association, located in _____, shall, without further action of this board of

directors, become the 'Acting Home Office of this Association'; and if neither _____ Branch nor _____ Branch can carry on their functions, then the Branch of this association, located in _____, shall, without further action of this board of directors, become the 'Acting Home Office of this Association.' The Home Office shall resume its functions at its legally authorized location as soon as practicable.

[59 FR 18476, April 19, 1994]

<<CHAPTER V--OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF THE TREASURY>>

Source: 59 FR 18475, April 19, 1994; 60 FR 66715, Dec. 26, 1995, unless otherwise noted.

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<<PART 544--CHARTER AND BYLAWS>>

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901 et seq.

Source: 54 FR 49486, Nov. 30, 1989; 59 FR 18476, April 19, 1994, unless otherwise noted.

---------- **End of Document** ----------

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER VII--NATIONAL CREDIT UNION ADMINISTRATION.
SUBCHAPTER A--REGULATIONS AFFECTING CREDIT UNIONS
PART 707--TRUTH IN SAVINGS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix C to Part 707--Official Staff Interpretations

Introduction

1. Official status. This commentary is the means by which the staff of the Office of General Counsel of the National Credit Union Administration issues official staff interpretations of Part 707 of the NCUA Rules and Regulations. Good faith compliance with this commentary affords protection from liability under section 271(f) of the Truth in Savings Act (TISA), 12 U.S.C. 4311.

Section 707.1--Authority, Purpose, Coverage, and Effect on State Laws

(c) Coverage

1. Foreign applicability. Part 707 applies to all credit unions that offer share and deposit accounts to residents (including resident aliens) of any state as defined in Sec. 707.2(v) and that offer accounts insurable by the National Credit Union Share Insurance Fund (NCUSIF) whether or not such accounts are insured by the NCUSIF. Corporate credit unions designated as such by NCUA under 12 CFR 704.2 (definition of 'corporate credit union') are exempt from part 707.

2. Persons who advertise accounts. Persons who advertise accounts are subject to the advertising rules. This includes agent and agented accounts, such as a member who subdivides interests in a jumbo term share certificate account for sale to other parties or among members who form a certificate account investment club. For example, if an agent places an advertisement that offers members an interest in an account at a credit union, the advertising rules apply to the advertisement, whether the account is held by the agent or directly by the member.

(d) Effect on State Laws

1. Preemption of state laws/Inconsistent requirements. State law requirements that are inconsistent with the requirements of TISA and part 707 are preempted to the extent of the inconsistency. A state law is inconsistent if it requires a credit union to make disclosures or take actions that contradict the requirements of the federal law. A state law is also contradictory if it requires the use of the same term to represent a different amount or a different meaning than the federal law, requires the use of a term different from that required in the federal law to describe the same item, or permits a method of calculating dividends or interest on an account different from that required in the federal law.

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2. Preemption determinations. A credit union, state, or other interested party may request the Board to determine whether a state law requirement is inconsistent with the federal requirements. A request for a determination should be addressed to NCUA's Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314. Written preemption requests should cite (or include a copy of) the allegedly inconsistent state law, demonstrate the inconsistency with TISA and part 707 and the burden on credit unions, and formally request a preemption determination. The Office of General Counsel may provide other interested parties, particularly affected states, an informal opportunity to comment on any request for a preemption determination, unless it finds that such notice and opportunity for comment would be impracticable, unnecessary, or contrary to the public interest. NCUA will publicize any preemption determinations using any means readily at its disposal.

3. Effect of preemption determinations. After the Board, through its Office of General Counsel, determines that a state law is inconsistent, a credit union may not make disclosures using the inconsistent term or take actions relying on the inconsistent law.

4. Reversal of determination. The Board reserves the right to reverse a determination for any reason bearing on the coverage or effect of state or federal law.

Section 707.2--Definitions

(a) Account

1. Covered accounts. Examples of accounts subject to the regulation are:

i. Dividend-bearing and interest-bearing accounts.

ii. Non-dividend-bearing and non-interest-bearing accounts.

iii. Accounts opened as a condition of obtaining a credit card.

iv. Escrow accounts with a consumer purpose, such as an account established by a member to escrow rental payments, pending resolution of a dispute with the member's landlord.

v. Accounts held by a parent or custodian for a minor under a state's Uniform Gift to Minors Act (or Uniform Transfers to Minors Act).

vi. Individual retirement accounts (IRAs) and simplified employee pension (SEP) accounts.

vii. Payable-on-Death (POD) or 'Totten trust' accounts.

2. Other accounts. Examples of accounts not subject to the regulation are:

i. Mortgage escrow accounts for collecting taxes and property insurance premiums.

ii. Accounts established to make periodic disbursements on construction loans.

iii. Trust accounts opened by a trustee pursuant to a formal written trust agreement (not merely declarations of trust on a signature card such as a 'Totten trust,' or an IRA or SEP account).

iv. Accounts opened by an executor in the name of decedent's estate.

v. Accounts of individuals operating businesses as sole proprietors.

vi. Certificates of indebtedness. Some credit unions borrow funds from their members through a certificate of indebtedness that sets forth the terms and conditions of the repayment of the borrowing, such as federal credit unions do through 12 CFR 701.38. Such an account does not represent an account in a credit union and is not covered by part 707.

vii. Unincorporated nonbusiness association accounts.

time account at the institution's option (a 'callable' time account).

(b)(6)(ii) Early withdrawal penalties

1. General. The term 'penalty' may but need not be used to describe the loss of interest that consumers may incur for early withdrawal of funds from time accounts.

2. Examples. Examples of early withdrawal penalties are:

i. Monetary penalties, such as '$10.00' or 'seven days' interest plus accrued but uncredited interest'

ii. Adverse changes to terms such as a lowering of the interest rate, annual percentage yield, or compounding frequency for funds remaining on deposit

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iii. Reclamation of bonuses

3. Relation to rules for IRAs or similar plans. Penalties imposed by the Internal Revenue Code for certain withdrawals from IRAs or similar pension or savings plans are not early withdrawal penalties for purposes of this regulation.

4. Disclosing penalties. Penalties may be stated in months, whether institutions assess the penalty using the actual number of days during the period or using another method such as a number of days that occurs in any actual sequence of the total calendar months involved. For example, stating 'one month's interest' is permissible, whether the institution assesses 30 days' interest during the month of April, or selects a time period between 28 and 31 days for calculating the interest for all early withdrawals regardless of when the penalty is assessed.

(b)(6)(iv) Renewal policies

1. Rollover time accounts. Institutions offering a grace period on time accounts that automatically renew need not state whether interest will be paid if the funds are withdrawn during the grace period.

2. Nonrollover time accounts. Institutions paying interest on funds following the maturity of time accounts that do not renew automatically need not state the rate (or annual percentage yield) that may be paid. (See Appendix B, Model Clause B-1(h)(iv)(2).)

Section 230.5 Subsequent disclosures.

(a) Change in terms

(a)(1) Advance notice required

1. Form of notice. Institutions may provide a change-in-term notice on or with a periodic statement or in another mailing. If an institution provides notice through revised account disclosures, the changed term must be highlighted in some manner. For example, institutions may note that a particular fee has been changed (also specifying the new amount) or use an accompanying letter that refers to the changed term.

2. Effective date. An example of language for disclosing the effective date of a change is 'As of November 21, 1994.'

3. Terms that change upon the occurrence of an event. An institution offering terms that will automatically change upon the occurrence of a stated event need not send an advance notice of the change provided the institution fully describes the conditions of the change in the account opening disclosures (and sends any change-in-term notices regardless of whether the changed term affects that consumer's account at that time).

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4. Examples. Examples of changes not requiring an advance change-in-terms notice are:

i. The termination of employment for consumers for whom account maintenance or

activity fees were waived during their employment by the depository institution
ii. The expiration of one year in a promotion described in the account opening disclosures to 'waive $4.00 monthly service charges for one year'

(a)(2) No notice required

(a)(2)(ii) Check printing fees

1. Increase in fees. A notice is not required for an increase in fees for printing checks (or deposit and withdrawal slips) even if the institution adds some amount to the price charged by the vendor.

(b) Notice before maturity for time accounts longer than one month that renew automatically

1. Maturity dates on nonbusiness days. In determining the term of a time account, institutions may disregard the fact that the term will be extended beyond the disclosed number of days because the disclosed maturity falls on a nonbusiness day. For example, a holiday or weekend may cause a 'one-year' time account to extend beyond 365 days (or 366, in a leap year) or a 'one-month' time account to extend beyond 31 days.

2. Disclosing when rates will be determined. Ways to disclose when the annual percentage yield will be available include the use of:

i. A specific date, such as 'October 28'

ii. A date that is easily determinable, such as 'the Tuesday before the maturity date stated on this notice' or 'as of the maturity date stated on this notice'

3. Alternative timing rule. Under the alternative timing rule, an institution offering a 10-day grace period would have to provide the disclosures at least 10 days prior to the scheduled maturity date.

4. Club accounts. If consumers have agreed to the transfer of payments from another account to a club time account for the next club period, the institution must comply with the requirements for automatically renewable time accounts--even though consumers may withdraw funds from the club account at the end of the current club period.

5. Renewal of a time account. In the case of a change in terms that becomes effective if a rollover time account is subsequently renewed:

i. If the change is initiated by the institution, the disclosure requirements of this paragraph apply. (Paragraph 230.5(a) applies if the change becomes effective prior to the maturity of the existing time account.)

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ii. If the change is initiated by the consumer, the account opening disclosure requirements of Sec. 230.4(b) apply. (If the notice required by this paragraph has been provided, institutions may give new account disclosures or disclosures highlighting only the new term.)

6. Example. If a consumer receives a prematurity notice on a one-year time account and requests a rollover to a six-month account, the institution must provide either account opening disclosures including the new maturity date or, if all other terms previously disclosed in the prematurity notice remain the same, only the new maturity date.

(b)(1) Maturities of longer than one year

1. Highlighting changed terms. Institutions need not highlight terms that changed since the last account disclosures were provided.

(c) Notice for time accounts one month or less that renew automatically

1. Providing disclosures within a reasonable time. Generally, 10 calendar days after an account renews is a reasonable time for providing disclosures. For time accounts shorter than 10 days, disclosures should be given prior to the

next renewal date. For example, if a time account automatically renews every seven days, disclosures about an account that renews on Wednesday, December 7, 1994, should be given prior to Wednesday, December 14.

(d) Notice before maturity for time accounts longer than one year that do not renew automatically

1. Subsequent account. When funds are transferred following maturity of a nonrollover time account, institutions need not provide account disclosures unless a new account is established.

Section 230.6 Periodic statement disclosures.

(a) General rule

1. General. Institutions are not required to provide periodic statements. If they do provide statements, disclosures need only be furnished to the extent applicable. For example, if no interest is earned for a statement period, institutions need not state that fact. Or, institutions may disclose '$0' interest earned and '0%' annual percentage yield earned.

2. Regulation E interim statements. When an institution provides regular quarterly statements, and in addition provides a monthly interim statement to comply with Regulation E, the interim statement need not comply with this section unless it states interest or rate information. (See 12 CFR Sec. 205.9(b).)

3. Combined statements. Institutions may provide information about an account (such as an MMDA) on the periodic statement for another account (such as a NOW account) without triggering the disclosures required by this section, as long as:

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i. The information is limited to the account number, the type of account, or balance information, and

ii. The institution also provides a periodic statement complying with this section for each account.

4. Other information. Additional information that may be given on or with a periodic statement includes:

i. Interest rates and corresponding periodic rates applied to balances during the statement period

ii. The dollar amount of interest earned year-to-date

iii. Bonuses paid (or any de minimis consideration of $10 or less)

iv. Fees for products such as safe deposit boxes

(a)(1) Annual percentage yield earned

1. Ledger and collected balances. Institutions that accrue interest using the collected balance method may use either the ledger or the collected balance in determining the annual percentage yield earned.

(a)(2) Amount of interest

1. Accrued interest. Institutions must state the amount of interest that accrued during the statement period, even if it was not credited.

2. Terminology. In disclosing interest earned for the period, institutions must use the term 'interest' or terminology such as:

i. 'Interest paid,' to describe interest that has been credited

ii. 'Interest accrued' or 'interest earned,' to indicate that interest is not yet credited

3. Closed accounts. If consumers close an account between crediting periods and forfeits accrued interest, the institution may not show any figures for interest earned or annual percentage yield earned for the period (other than zero, at the institution's option).

(a)(3) Fees imposed

1. General. Periodic statements must state fees disclosed under Sec. 230.4(b) that were debited to the account during the statement period, even if assessed for an earlier period.

2. Itemizing fees by type. In itemizing fees imposed more than once in the period, institutions may group fees if they are the same type. But the description must make **clear** that the dollar figure represents more than a single fee, for example, 'total fees for **checks** written this period.' Examples of fees that may not be grouped together are:

i. Monthly maintenance and excess activity fees

ii. 'Transfer' fees, if different dollar amounts are imposed--such as $.50 for deposits and $1.00 for withdrawals

iii. Fees for electronic fund transfers and fees for other services, such as balance inquiry or maintenance fees

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3. Identifying fees. Statement details must enable consumers to identify the specific fee. For example:

i. Institutions may use a code to identify a particular fee if the code is explained on the periodic statement or in documents accompanying the statement.

ii. Institutions using debit slips may disclose the date the fee was debited on the periodic statement and show the amount and type of fee on the dated debit slip.

4. Relation to Regulation E. Disclosure of fees in compliance with Regulation E complies with this section for fees related to electronic fund transfers (for example, totaling all electronic funds transfer fees in a single figure).

(a)(4) Length of period

1. General. Institutions providing the beginning and ending dates of the period must make clear whether both dates are included in the period.

2. Opening or closing an account mid-cycle. If an account is opened or closed during the period for which a statement is sent, institutions must calculate the annual percentage yield earned based on account balances for each day the account was open.

(b) Special rule for average daily balance method

1. Monthly statements and quarterly compounding. This rule applies, for example, when an institution calculates interest on a quarterly average daily balance and sends monthly statements. In this case, the first two monthly statements would omit annual percentage yield earned and interest earned figures; the third monthly statement would reflect the interest earned and the annual percentage yield earned for the entire quarter.

2. Length of the period. Institutions must disclose the length of both the interest calculation period and the statement period. For example, a statement could disclose a statement period of April 16 through May 15 and further state that 'the interest earned and the annual percentage yield earned are based on your average daily balance for the period April 1 through April 30.'

3. Quarterly statements and monthly compounding. Institutions that use the average daily balance method to calculate interest on a monthly basis and that send statements on a quarterly basis may disclose a single interest (and annual percentage yield earned) figure. Alternatively, an institution may disclose three interest and three annual percentage yield earned figures, one for each month in the quarter, as long as the institution states the number of days (or beginning and ending dates) in the interest period if different from the statement period.

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Section 230.7 Payment of interest.

(a)(1) Permissible methods

1. Prohibited calculation methods. Calculation methods that do not comply with the requirement to pay interest on the full amount of principal in the account each day include:

i. Paying interest on the balance in the account at the end of the period (the 'ending balance' method)

ii. Paying interest for the period based on the lowest balance in the account for any day in that period (the 'low balance' method)

iii. Paying interest on a percentage of the balance, excluding the amount set aside for reserve requirements (the 'investable balance' method)

2. Use of 365-day basis. Institutions may apply a daily periodic rate greater than 1/365 of the interest rate--such as 1/360 of the interest rate--as long as it is applied 365 days a year.

3. Periodic interest payments. An institution can pay interest each day on the account and still make uniform interest payments. For example, for a one-year certificate of deposit an institution could make monthly interest payments equal to 1/12 of the amount of interest that will be earned for a 365-day period (or 11 uniform monthly payments--each equal to roughly 1/12 of the total amount of interest--and one payment that accounts for the remainder of the total amount of interest earned for the period).

4. Leap year. Institutions may apply a daily rate of 1/366 or 1/365 of the interest rate for 366 days in a leap year, if the account will earn interest for February 29.

5. Maturity of time accounts. Institutions are not required to pay interest after time accounts mature. (See 12 CFR part 217, the Board's Regulation Q, for limitations on duration of interest payments.) Examples include:

i. During a grace period offered for an automatically renewable time account, if consumers decide during that period not to renew the account

ii. Following the maturity of nonrollover time accounts

iii. When the maturity date falls on a holiday, and consumers must wait until the next business day to obtain the funds

6. Dormant accounts. Institutions must pay interest on funds in an account, even if inactivity or the infrequency of transactions would permit the institution to consider the account to be 'inactive' or 'dormant' (or similar status) as defined by state or other law or the account contract.

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(a)(2) Determination of minimum balance to earn interest

1. Daily balance accounts. Institutions that require a minimum balance may choose not to pay interest for days when the balance drops below the required minimum, if they use the daily balance method to calculate interest.

2. Average daily balance accounts. Institutions that require a minimum balance may choose not to pay interest for the period in which the balance drops below the required minimum, if they use the average daily balance method to calculate interest.

3. Beneficial method. Institutions may not require that consumers maintain both a minimum daily balance and a minimum average daily balance to earn interest, such as by requiring consumers to maintain a $500 daily balance and a prescribed average daily balance (whether higher or lower). But an institution could offer a minimum balance to earn interest that includes an additional method that is 'unequivocally beneficial' to consumers such as the following: An institution using the daily balance method to calculate interest and requiring a $500 minimum daily balance could offer to pay interest on the account for those

days the minimum balance is not met as long as consumers maintain an average daily balance throughout the month of $400.

4. Paying on full balance. Institutions must pay interest on the full balance in the account that meets the required minimum balance. For example, if $300 is the minimum daily balance required to earn interest, and a consumer deposits $500, the institution must pay the stated interest rate on the full $500 and not just on $200.

5. Negative balances prohibited. Institutions must treat a negative account balance as zero to determine:

i. The daily or average daily balance on which interest will be paid

ii. Whether any minimum balance to earn interest is met

6. Club accounts. Institutions offering club accounts (such as a 'holiday' or 'vacation' club) cannot impose a minimum balance requirement for interest based on the total number or dollar amount of payments required under the club plan. For example, if a plan calls for $10 weekly payments for 50 weeks, the institution cannot set a $500 'minimum balance' and then pay interest only if the consumer has made all 50 payments.

7. Minimum balances not affecting interest. Institutions may use the daily balance, average daily balance, or any other computation method to calculate minimum balance requirements not involving the payment of interest--such as to compute minimum balances for assessing fees.

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(b) Compounding and crediting policies

1. General. Institutions choosing to compound interest may compound or credit interest annually, semi-annually, quarterly, monthly, daily, continuously, or on any other basis.

2. Withdrawals prior to crediting date. If consumers withdraw funds (without closing the account) prior to a scheduled crediting date, institutions may delay paying the accrued interest on the withdrawn amount until the scheduled crediting date, but may not avoid paying interest.

3. Closed accounts. Subject to state or other law, an institution may choose not to pay accrued interest if consumers close an account prior to the date accrued interest is credited, as long as the institution has disclosed that fact.

(c) Date interest begins to accrue

1. Relation to Regulation CC. Institutions may rely on the Expedited Funds Availability Act (EFAA) and Regulation CC (12 CFR part 229) to determine, for example, when a deposit is considered made for purposes of interest accrual, or when interest need not be paid on funds because a deposited check is later returned unpaid.

2. Ledger and collected balances. Institutions may calculate interest by using a 'ledger' or 'collected' balance method, as long as the crediting requirements of the EFAA are met (12 CFR 229.14).

3. Withdrawal of principal. Institutions must accrue interest on funds until the funds are withdrawn from the account. For example, if a check is debited to an account on a Tuesday, the institution must accrue interest on those funds through Monday.

Section 230.8 Advertising.

(a) Misleading or inaccurate advertisements

1. General. All advertisements are subject to the rule against misleading or inaccurate advertisements, even though the disclosures applicable to various media differ.

2. Indoor signs. An indoor sign advertising an annual percentage yield is not misleading or inaccurate when:

i. For a tiered-rate account, it also provides the lower dollar amount of the tier corresponding to the advertised annual percentage yield
ii. For a time account, it also provides the term required to obtain the advertised annual percentage yield

3. Fees affecting 'free' accounts. For purposes of determining whether an account can be advertised as 'free' or 'no cost,' maintenance and activity fees include:

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i. Any fee imposed when a minimum balance requirement is not met, or when consumers exceed a specified number of transactions
ii. Transaction and service fees that consumers reasonably expect to be imposed on a regular basis
iii. A flat fee, such as a monthly service fee
iv. Fees imposed to deposit, withdraw, or transfer funds, including per-check or per-transaction charges (for example, $.25 for each withdrawal, whether by check or in person)

4. Other fees. Examples of fees that are not maintenance or activity fees include:

i. Fees not required to be disclosed under Sec. 230.4(b)(4)
ii. Check printing fees
iii. Balance inquiry fees
iv. Stop-payment fees and fees associated with checks returned unpaid
v. Fees assessed against a dormant account
vi. Fees for ATM or electronic transfer services (such as preauthorized transfers or home banking services) not required to obtain an account

5. Similar terms. An advertisement may not use the term 'fees waived' if a maintenance or activity fee may be imposed because it is similar to the terms 'free' or 'no cost.'

6. Specific account services. Institutions may advertise a specific account service or feature as free if no fee is imposed for that service or feature. For example, institutions offering an account that is free of deposit or withdrawal fees could advertise that fact, as long as the advertisement does not mislead consumers by implying that the account is free and that no other fee (a monthly service fee, for example) may be charged.

7. Free for limited time. If an account (or a specific account service) is free only for a limited period of time--for example, for one year following the account opening--the account (or service) may be advertised as free if the time period is also stated.

8. Conditions not related to deposit accounts. Institutions may advertise accounts as 'free' for consumers meeting conditions not related to deposit accounts, such as the consumer's age. For example, institutions may advertise a NOW account as 'free for persons over 65 years old,' even though a maintenance or activity fee is assessed on accounts held by consumers 65 or younger.

(b) Permissible rates

1. Tiered-rate accounts. An advertisement for a tiered-rate account that states an annual percentage yield must also state the annual percentage yield for each tier, along with corresponding minimum balance requirements. Any interest rates stated must appear in conjunction with the applicable annual percentage yields for each tier.

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2. Stepped-rate accounts. An advertisement that states an interest rate for a stepped-rate account must state all the interest rates and the time period that each rate is in effect.

3. Representative examples. An advertisement that states an annual percentage yield for a given type of account (such as a time account for a specified term) need not state the annual percentage yield applicable to other time accounts offered by the institution or indicate that other maturity terms are available. In an advertisement stating that rates for an account may vary depending on the amount of the initial deposit or the term of a time account, institutions need not list each balance level and term offered. Instead, the advertisement may:

i. Provide a representative example of the annual percentage yields offered, clearly described as such. For example, if an institution offers a $25 bonus on all time accounts and the annual percentage yield will vary depending on the term selected, the institution may provide a disclosure of the annual percentage yield as follows: 'For example, our 6-month certificate of deposit currently pays a 3.15% annual percentage yield.'

ii. Indicate that various rates are available, such as by stating short-term and longer-term maturities along with the applicable annual percentage yields: 'We offer certificates of deposit with annual percentage yields that depend on the maturity you choose. For example, our one-month CD earns a 2.75% APY. Or, earn a 5.25% APY for a three-year CD.'

(c) When additional disclosures are required

1. Trigger terms. The following are examples of information stated in advertisements that are not 'trigger' terms:

i. 'One, three, and five year CDs available'

ii. 'Bonus rates available'

iii. '1% over our current rates,' so long as the rates are not determinable from the advertisement

(c)(2) Time annual percentage yield is offered

1. Specified date. If an advertisement discloses an annual percentage yield as of a specified date, that date must be recent in relation to the publication or broadcast frequency of the media used, taking into account the particular circumstances or production deadlines involved. For example, the printing date of a brochure printed once for a deposit account promotion that will be in effect for six months would be considered 'recent,' even though rates change during the six-month period. Rates published in a daily newspaper or on television must reflect rates offered shortly before (or on) the date the rates are published or broadcast.

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2. Reference to date of publication. An advertisement may refer to the annual percentage yield as being accurate as of the date of publication, if the date is on the publication itself. For instance, an advertisement in a periodical may state that a rate is 'current through the date of this issue,' if the periodical shows the date.

(c)(5) Effect of fees

1. Scope. This requirement applies only to maintenance or activity fees described in paragraph 8(a).

(c)(6) Features of time accounts

(c)(6)(i) Time requirements

1. Club accounts. If a club account has a maturity date but the term may vary depending on when the account is opened, institutions may use a phrase such as: 'The maturity date of this club account is November 15; its term varies depending on when the account is opened.'

(c)(6)(ii) Early withdrawal penalties

1. Discretionary penalties. Institutions imposing early withdrawal penalties on a case-by-case basis may disclose that they 'may' (rather than 'will') impose

a penalty if such a disclosure accurately describes the account terms.

(d) Bonuses

1. General reference to 'bonus.' General statements such as 'bonus checking' or 'get a bonus when you open a checking account' do not trigger the bonus disclosures.

(e) Exemption for certain advertisements

(e)(1) Certain media

(e)(1)(iii)

1. Tiered-rate accounts. Solicitations for a tiered-rate account made through telephone response machines must provide the annual percentage yields and the balance requirements applicable to each tier.

(e)(2) Indoor signs

(e)(2)(i)

1. General. Indoor signs include advertisements displayed on computer screens, banners, preprinted posters, and chalk or peg boards. Any advertisement inside the premises that can be retained by a consumer (such as a brochure or a printout from a computer) is not an indoor sign.

2. Consumers outside the premises. Advertisements may be 'indoor signs' even though they may be viewed by consumers from outside. An example is a banner, in an institution's glass-enclosed branch office, that is located behind a teller facing customers but is readable by passersby.

Section 230.9 Enforcement and record retention.

(c) Record retention

1. Evidence of required actions. Institutions comply with the regulation by demonstrating that they have done the following:

i. Established and maintained procedures for paying interest and providing timely disclosures as required by the regulation, and

ii. Retained sample disclosures for each type of account offered to consumers, such as account-opening disclosures, copies of advertisements, and change-in-term notices; and information regarding the interest rates and annual percentage yields offered.

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2. Methods of retaining evidence. Institutions must be able to reconstruct the required disclosures or other actions. They need not keep disclosures or other business records in hard copy. Records evidencing compliance may be retained on microfilm, microfiche, or by other methods that reproduce records accurately (including computer files).

3. Payment of interest. Institutions must retain sufficient rate and balance information to permit the verification of interest paid on an account, including the payment of interest on the full principal balance.

Appendix A to Part 230--Annual Percentage Yield Calculation

Part I. Annual Percentage Yield for Account Disclosures and Advertising Purposes

1. Rounding for calculations. The following are examples of permissible rounding for calculating interest and the annual percentage yield:

i. The daily rate applied to a balance carried to five or more decimal places

ii. The daily interest earned carried to five or more decimal places

Part II. Annual Percentage Yield Earned for Periodic Statements

1. Balance method. The interest figure used in the calculation of the annual percentage yield earned may be derived from the daily balance method or the average daily balance method. The balance used in the formula for the annual percentage yield earned is the sum of the balances for each day in the period divided by the number of days in the period.

2. Negative balances prohibited. Institutions must treat a negative account balance as zero to determine the balance on which the annual percentage yield earned is calculated. (See commentary to Sec. 230.7(a)(2).)

A. General Formula

1. Accrued but uncredited interest. To calculate the annual percentage yield earned, accrued but uncredited interest:

i. May not be included in the balance for statements issued at the same time or less frequently than the account's compounding and crediting frequency. For example, if monthly statements are sent for an account that compounds interest daily and credits interest monthly, the balance may not be increased each day to reflect the effect of daily compounding.

ii. Must be included in the balance for succeeding statements if a statement is issued more frequently than compounded interest is credited on an account. For example, if monthly statements are sent for an account that compounds interest daily and credits interest quarterly, the balance for the second monthly statement would include interest that had accrued for the prior month.

2. Rounding. The interest earned figure used to calculate the annual percentage yield earned must be rounded to two decimals and reflect the amount actually paid. For example, if the interest earned for a statement period is $20.074 and the institution pays the consumer $20.07, the institution must use $20.07 (not $20.074) to calculate the annual percentage yield earned. For accounts paying interest based on the daily balance method that compound and credit interest quarterly, and send monthly statements, the institution may, but need not, round accrued interest to two decimals for calculating the annual percentage yield earned on the first two monthly statements issued during the quarter. However, on the quarterly statement the interest earned figure must reflect the amount actually paid.

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B. Special Formula for Use Where Periodic Statement is Sent More Often Than the Period for Which Interest is Compounded

1. Statements triggered by Regulation E. Institutions may, but need not, use this formula to calculate the annual percentage yield earned for accounts that receive quarterly statements and are subject to Regulation E's rule calling for monthly statements when an electronic fund transfer has occurred. They may do so even though no monthly statement was issued during a specific quarter. But institutions must use this formula for accounts that compound and credit interest quarterly and receive monthly statements that, while triggered by Regulation E, comply with the provisions of Sec. 230.6.

2. Days in compounding period. Institutions using the special annual

percentage yield earned formula must use the actual number of days in the compounding period.

Appendix B to Part 230 --Model Clauses and Sample Forms

1. Modifications. Institutions that modify the model clauses will be deemed in compliance as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures.

2. Format. Institutions may use inserts to a document (see Sample Form B-4) or fill-in blanks (see Sample Forms B-5, B-6 and B-7, which use underlining to indicate terms that have been filled in) to show current rates, fees, or other terms.

3. Disclosures for opening accounts. The sample forms illustrate the information that must be provided to consumers when an account is opened, as required by Sec. 230.4(a)(1). (See Sec. 230.4(a)(2), which states the requirements for disclosing the annual percentage yield, the interest rate, and the maturity of a time account in responding to a consumer's request.)

4. Compliance with Regulation E. Institutions may satisfy certain requirements under Regulation DD with disclosures that meet the requirements of Regulation E. (See Sec. 230.3(c).) For disclosures covered by both this regulation and Regulation E (such as the amount of fees for ATM usage, institutions should consult appendix A to Regulation E for appropriate model clauses.

5. Duplicate disclosures. If a requirement such as a minimum balance applies to more than one account term (to obtain a bonus and determine the annual percentage yield, for example), institutions need not repeat the requirement for each term, as long as it is clear which terms the requirement applies to.

6. Sample forms. The sample forms (B-4 through B-8) serve a purpose different from the model clauses. They illustrate ways of adapting the model clauses to specific accounts. The clauses shown relate only to the specific transactions described.

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B-1 Model Clauses for Account Disclosures

B-1(h) Disclosures Relating to Time Accounts

1. Maturity. The disclosure in Clause (h)(i) stating a specific date may be used in all cases. The statement describing a time period is appropriate only when providing disclosures in response to a consumer's request.

B-2 Model Clauses for Change in Terms

1. General. The second clause, describing a future decrease in the interest rate and annual percentage yield, applies to fixed-rate accounts only.

B-4 Sample Form (Multiple Accounts)

1. Rate sheet insert. In the rate sheet insert, the calculations of the annual percentage yield for the three-month and six-month certificates are based

(including transaction accounts where the account holder is a bank, foreign bank, or the U.S. Treasury) that are not 'accounts' under Regulation CC. (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on Other Funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC in certain circumstances.)

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The Wisconsin statute applies to 'items' deposited in accounts. This term encompasses instruments that are not defined as 'checks' in Regulation CC (s 229.2(k)), such as nonnegotiable instruments, and are therefore not subject to Regulation CC's provisions governing funds availability. Those items that are subject to Wisconsin law but are not subject to Regulation CC will continue to be covered by the state availability schedules and exceptions.

Availability Schedules

Temporary schedule. The Wisconsin statute requires that in-state nonlocal checks be made available for withdrawal not later than the fifth day following deposit (Wisconsin Statutes sections 404.213(4m)(b)(2); 215.136(2)(b); 186.117(2)(b)). This time period is shorter than the seventh business day availability required for nonlocal checks under Sec. 229.11(c) of Regulation CC, although it is not shorter than the schedules for nonlocal checks set forth in Sec. 229.11(c)(2) and Appendix B-1 of Regulation CC. Thus, the state schedule for in-state nonlocal checks supersedes the Federal schedule to the extent that it applies to an item payable by a Wisconsin bank that is defined as a nonlocal check under Regulation CC and is not subject to reduced schedules under Sec. 229.11(c)(2) and Appendix B-1.

Permanent Schedule. Under the Federal permanent availability schedule, nonlocal checks must be made available for withdrawal not later than the fifth business day following deposit. The fifth day availability requirement for in-state items in the Wisconsin statute supersedes the Regulation CC time period adjustment for withdrawal by cash or similar means in the permanent schedule, to the extent that the in-state checks are defined as nonlocal under Regulation CC.

Next-day availability. Under the Wisconsin statute, the proceeds of state and local government **checks** must be made available for withdrawal by the second day following deposit, if the **check** is **indorsed** only by the person to whom it was issued (Wisconsin Statutes sections 404.213(4m)(b)(1); 215.136(2)(b); and 186.117(2)(a)). Regulation CC requires next-day availability for these **checks** if they are (1) deposited in an account of a payee of the **check,** (2) deposited in a depositary bank located in the same state as the state or local government that issued the **check,** (3) deposited in person to an employee of the depositary bank, and (4) deposited with a special deposit slip, if the depositary bank informed its customers that use of such a slip is a condition to next-day availability. Under the Federal law, if a state or local government **check** is not deposited in person to an employee of the depositary bank, but meets the other conditions set forth in Sec. 229.10(c)(1)(iv), the funds must be made available for withdrawal not later than the second business day following deposit. The Wisconsin statute supersedes Regulation CC to the extent that the state law does not permit the use of a special deposit slip as a condition to receipt of second-day availability.

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Exceptions to the schedules. Wisconsin law provides exceptions to the state availability schedules for new accounts (those opened less than 90 days) and reason to doubt collectibility (Wisconsin Statutes sections 404.213(4m)(b);

215.136(2); and 186.117(2)). The state availability law also permits commercial banks to vary the funds availability requirements by agreement (Wisconsin Statute section 404.103(1)). In all cases where the Federal schedule preempts the state schedule, only the Federal exceptions apply. For deposits that are covered by the state availability schedule (e.g., in-state nonlocal checks), a state exception must apply in order to extend the state availability schedule up to the Federal availability schedule. Once the deposit is held up to the Federal availability limit under a state exception, the depositary bank may further extend the hold only if a Federal exception can be applied to the deposit. Any time a depositary bank invokes an exception to extend a hold beyond the time periods otherwise permitted by law, it must give notice of the extended hold to its customer in accordance with Sec. 229.13(g) of Regulation CC.

Business day/banking day. The definitions of 'business day' and 'banking day' in the Wisconsin statutes are preempted by the Regulation CC definition of those terms. For determining the permissible hold under the Wisconsin schedules that supersede the Regulation CC schedule, deposits are considered available for withdrawal on the specified number of 'business days' following the 'banking day' of deposit.

Wisconsin law considers funds to be deposited, for the purpose of determining when they must be made available for withdrawal, when an item is 'received at the proof and transit facility of the depository.' For the purposes of this preemption determination, funds are considered deposited under Wisconsin law in accordance with the rules set forth in Sec. 229.19(a) of Regulation CC.

Disclosures

The Wisconsin statute does not require disclosure of a bank's funds availability policy. The state law does require, however, that a bank give notice to its customer if it extends the time within which funds will be available for withdrawal due to the bank's doubt as to the collectibility of the item (Wisconsin Statutes sections 404.213(4m)(b); 215.136(2); and 186.117(2)).

Regulation CC preempts state disclosure requirements concerning funds availability that relate to 'accounts' that are inconsistent with the Federal requirements. The state requirement is different from, and therefore inconsistent with, the Federal disclosure rules (s 229.20(c)(2)). Thus, the Wisconsin statute is preempted by Regulation CC to the extent that the state notice requirement applies to 'accounts' as defined by Regulation CC. The Wisconsin requirement would continue to apply to accounts, such as savings and time accounts, not governed by the Regulation CC disclosure requirements.

[53 FR 32356, Aug. 24, 1988; 53 FR 44328, Nov. 2, 1988; 53 FR 47524, Nov. 23, 1988; 53 FR 51748, Dec. 23, 1988; 54 FR 13838, April 6, 1989; 55 FR 11358, March 28, 1990; 60 FR 51703, Oct. 3, 1995]

<<PART 229
--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)>>

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Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 230--TRUTH IN SAVINGS (REGULATION DD)

Titles 1-50 current through January 1, 1996; 60 FR 67518

Supplement I to Part 230--Official Staff Interpretations

Introduction

1. Official status. This commentary is the means by which the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation DD. Good faith compliance with this commentary affords protection from liability under section 271(f) of the Truth in Savings Act.

Section 230.1--Authority, purpose, coverage, and effect on state laws.

(c) Coverage

1. Foreign applicability. Regulation DD applies to all depository institutions, except credit unions, that offer deposit accounts to residents (including resident aliens) of any state as defined in Sec. 230.2(r). Accounts held in an institution located in a state are covered, even if funds are transferred periodically to a location outside the United States. Accounts held in an institution located outside the United States are not covered, even if held by a U.S. resident.

2. Persons who advertise accounts. Persons who advertise accounts are subject to the advertising rules. For example, if a deposit broker places an advertisement offering consumers an interest in an account at a depository institution, the advertising rules apply to the advertisement, whether the account is to be held by the broker or directly by the consumer.

Section 230.2--Definitions.

(a) Account

1. Covered accounts. Examples of accounts subject to the regulation are:

i. Interest-bearing and noninterest-bearing accounts
ii. Deposit accounts opened as a condition of obtaining a credit card
iii. Accounts denominated in a foreign currency
iv. Individual retirement accounts (IRAs) and simplified employee pension (SEP) accounts
v. Payable on death (POD) or 'Totten trust' accounts

2. Other accounts. Examples of accounts not subject to the regulation are:

i. Mortgage escrow accounts for collecting taxes and property insurance premiums
ii. Accounts established to make periodic disbursements on construction loans

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iii. Trust accounts opened by a trustee pursuant to a formal written trust agreement (not merely declarations of trust on a signature card such as a 'Totten trust,' or an IRA and SEP account)
iv. Accounts opened by an executor in the name of a decedent's estate

3. Other investments. The term 'account' does not apply to all products of a depository institution. Examples of products not covered are:

i. Government securities
ii. Mutual funds
iii. Annuities
iv. Securities or obligations of a depository institution
v. Contractual arrangements such as repurchase agreements, interest rate swaps, and bankers acceptances

(b) Advertisement

1. Covered messages. Advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to prospective customers the availability of consumer accounts--such as:

i. Telephone solicitations
ii. Messages on automated teller machine (ATM) screens
iii. Messages on a computer screen in an institution's lobby (including any printout) other than a screen viewed solely by the institution's employee
iv. Messages in a newspaper, magazine, or promotional flyer or on radio
v. Messages that are provided along with information about the consumer's existing account and that promote another account at the institution

2. Other messages. Examples of messages that are not advertisements are:

i. Rate sheets in a newspaper, periodical, or trade journal (unless the depository institution, or a deposit broker offering accounts at the institution, pays a fee for or otherwise controls publication)
ii. In-person discussions with consumers about the terms for a specific account
iii. Information given to consumers about existing accounts, such as current rates recorded on a voice response machine or notices for automatically renewable time accounts sent before renewal

(f) Bonus

1. Examples. Bonuses include items of value, other than interest, offered as incentives to consumers, such as an offer to pay the final installment deposit for a holiday club account. Items that are not a bonus include discount coupons for goods or services at restaurants or stores.

2. De minimis rule. Items with a de minimis value of $10 or less are not bonuses. Institutions may rely on the valuation standard used by the Internal Revenue Service to determine if the value of the item is de minimis. Examples of items of de minimis value are:

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i. Disability insurance premiums valued at an amount of $10 or less per year
ii. Coffee mugs, T-shirts or other merchandise with a market value of $10 or less

3. Aggregation. In determining if an item valued at $10 or less is a bonus, institutions must aggregate per account per calendar year items that may be given to consumers. In making this determination, institutions aggregate per account only the market value of items that may be given for a specific promotion. To illustrate, assume an institution offers in January to give consumers an item valued at $7 for each calendar quarter during the year that the average account balance in a negotiable order of withdrawal (NOW) account exceeds $10,000. The bonus rules are triggered, since consumers are eligible under the promotion to receive up to $28 during the year. However, the bonus rules are not triggered if an item valued at $7 is offered to consumers opening a NOW account during the month of January, even though in November the institution introduces a new promotion that includes, for example, an offer to existing NOW account holders for an item valued at $8 for maintaining an average balance of $5,000 for the month.

4. Waiver or reduction of a fee or absorption of expenses. Bonuses do not include value that consumers receive through the waiver or reduction of fees (even if the fees waived exceed $10) for banking-related services such as the following:
i. A safe deposit box rental fee for consumers who open a new account
ii. Fees for travelers checks for account holders
iii. Discounts on interest rates charged for loans at the institution

(h) Consumer

1. Professional capacity. Examples of accounts held by a natural person in a professional capacity for another are attorney-client trust accounts and landlord-tenant security accounts.

2. Other accounts. Accounts not held in a professional capacity include accounts held by an individual for a child under the Uniform Gifts to Minors Act.

3. Sole proprietors. Accounts held by individuals as sole proprietors are not covered.

4. Retirement plans. IRAs and SEP accounts are consumer accounts to the extent that funds are invested in covered accounts. But Keogh accounts are not subject to the regulation.

(j) Depository institution and institution

1. Foreign institutions. Branches of foreign institutions located in the United States are subject to the regulation if they offer deposit accounts to consumers. Edge Act and Agreement corporations, and agencies of foreign institutions, are not depository institutions for purposes of this regulation.

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(k) Deposit broker

1. General. A deposit broker is a person who is in the business of placing or facilitating the placement of deposits in an institution, as defined by the Federal Deposit Insurance Act (12 U.S.C. 29(g)).

(n) Interest

1. Relation to Regulation Q. While bonuses are not interest for purposes of this regulation, other regulations may treat them as the equivalent of interest. For example, Regulation Q identifies payments of cash or merchandise that violate the prohibition against paying interest on demand accounts. (See 12 CFR Sec. 217.2(d).)

(p) Passbook savings account

1. Relation to Regulation E. Passbook savings accounts include accounts accessed by preauthorized electronic fund transfers to the account (as defined in 12 CFR Sec. 205.2(j)), such as an account that receives direct deposit of social security payments. Accounts permitting access by other electronic means are not 'passbook saving accounts' and must comply with the requirements of Sec. 230.6 if statements are sent four or more times a year.

(q) Periodic statement

1. Examples. Periodic statements do not include:
i. Additional statements provided solely upon request
ii. Information provided by computer through home banking services
iii. General service information such as a quarterly newsletter or other correspondence describing available services and products

(t) Tiered-rate account

1. Time accounts. Time accounts paying different rates based solely on the amount of the initial deposit are not tiered-rate accounts.

2. Minimum balance requirements. A requirement to maintain a minimum balance to earn interest does not make an account a tiered-rate account.

(u) Time account

1. Club accounts. Although club accounts typically have a maturity date, they are not time accounts unless they also require a penalty of at least seven days' interest for withdrawals during the first six days after the account is opened.

2. Relation to Regulation D. Regulation D permits in limited circumstances the withdrawal of funds without penalty during the first six days after a 'time deposit' is opened. (See 12 CFR Sec. 204.2(c)(1)(i).) But the fact that a consumer makes a withdrawal as permitted by Regulation D does not disqualify the account from being a time account for purposes of this regulation.

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(v) Variable-rate account

1. General. A certificate of deposit permitting one or more rate adjustments prior to maturity at the consumer's option is a variable-rate account.

Section 230.3 General disclosure requirements.

(a) Form

1. Design requirements. Disclosures must be presented in a format that allows consumers to readily understand the terms of their account. Institutions are not required to use a particular type size or typeface, nor are institutions required to state any term more conspicuously than any other term. Disclosures may be made:

i. In any order

ii. In combination with other disclosures or account terms

iii. In combination with disclosures for other types of accounts, as long as it is clear to consumers which disclosures apply to their account

iv. On more than one page and on the front and reverse sides

v. By using inserts to a document or filling in blanks

vi. On more than one document, as long as the documents are provided at the same time

2. Consistent terminology. Institutions must use consistent terminology to describe terms or features required to be disclosed. For example, if an institution describes a monthly fee (regardless of account activity) as a 'monthly service fee' in account-opening disclosures, the periodic statement and change-in-term notices must use the same terminology so that consumers can readily identify the fee.

(b) General

1. Specificity of legal obligation. Institutions may refer to the calendar month or to roughly equivalent intervals during a calendar year as a 'month.'

(c) Relation to Regulation E

1. General rule. Compliance with Regulation E (12 CFR part 205) is deemed to satisfy the disclosure requirements of this regulation, such as when:

i. An institution changes a term that triggers a notice under Regulation E, and uses the timing and disclosure rules of Regulation E for sending change-in-term notices

ii. Consumers add an ATM access feature to an account, and the institution provides disclosures pursuant to Regulation E, including disclosure of fees (See 12 CFR Sec. 205.7.)

iii. An institution complying with the timing rules of Regulation E discloses at the same time fees for electronic services (such as for balance inquiry fees at ATMs) required to be disclosed by this regulation but not by Regulation E

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iv. An institution relies on Regulation E's rules regarding disclosure of limitations on the frequency and amount of electronic fund transfers,

including security-related exceptions. But any limitations on 'intra-institutional transfers' to or from the consumer's other accounts during a given time period must be disclosed, even though intra-institutional transfers are exempt from Regulation E.

(e) Oral response to inquiries

1. Application of rule. Institutions are not required to provide rate information orally.

2. Relation to advertising. The advertising rules do not cover an oral response to a question about rates.

3. Existing accounts. This paragraph does not apply to oral responses about rate information for existing accounts. For example, if a consumer holding a one-year certificate of deposit (CD) requests interest rate information about the CD during the term, the institution need not disclose the annual percentage yield.

(f) Rounding and accuracy rules for rates and yields

(f)(1) Rounding

1. Permissible rounding. Examples of permissible rounding are an annual percentage yield calculated to be 5.644%, rounded down and disclosed as 5.64%; 5.645% rounded up and disclosed as 5.65%.

(f)(2) Accuracy

1. Annual percentage yield and annual percentage yield earned. The tolerance for annual percentage yield and annual percentage yield earned calculations is designed to accommodate inadvertent errors. Institutions may not purposely incorporate the tolerance into their calculation of yields.

Section 230.4 Account disclosures.

(a) Delivery of account disclosures

(a)(1) Account opening

1. New accounts. New account disclosures must be provided when:

i. A time account that does not automatically rollover is renewed by a consumer

ii. A consumer changes a term for a renewable time account (see Sec. 230.5(b)-5 regarding disclosure alternatives)

iii. An institution transfers funds from an account to open a new account not at the consumer's request, unless the institution previously gave account disclosures and any change-in-term notices for the new account

iv. An institution accepts a deposit from a consumer to an account that the institution had deemed closed for the purpose of treating accrued but uncredited interest as forfeited interest (see Sec. 230.7(b)-3)

2. Acquired accounts. New account disclosures need not be given when an institution acquires an account through an acquisition of or merger with another institution (but see Sec. 230.5(a) regarding advance notice requirements if terms are changed).

(a)(2) Requests

(a)(2)(i)

1. Inquiries versus requests. A response to an oral inquiry (by telephone or in person) about rates and yields or fees does not trigger the duty to provide account disclosures. But when consumers ask for written information about an account (whether by telephone, in person, or by other means), the institution must provide disclosures unless the account is no longer offered to the public.

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2. General requests. When responding to a consumer's general request for disclosures about a type of account (a NOW account, for example), an institution that offers several variations may provide disclosures for any one of them.

3. Timing for response. Ten business days is a reasonable time for responding to requests for account information that consumers do not make in

person.

(a)(2)(ii)(A)

1. Recent rates. Institutions comply with this paragraph if they disclose an interest rate and annual percentage yield accurate within the seven calendar days preceding the date they send the disclosures.

(a)(2)(ii)(B)

1. Term. Describing the maturity of a time account as '1 year' or '6 months,' for example, illustrates a statement of the maturity of a time account as a term rather than a date ('January 10, 1995').

(b) Content of account disclosures

(b)(1) Rate information

(b)(1)(i) Annual percentage yield and interest rate

1. Rate disclosures. In addition to the interest rate and annual percentage yield, institutions may disclose a periodic rate corresponding to the interest rate. No other rate or yield (such as 'tax effective yield') is permitted. If the annual percentage yield is the same as the interest rate, institutions may disclose a single figure but must use both terms.

2. Fixed-rate accounts. For fixed-rate time accounts paying the opening rate until maturity, institutions may disclose the period of time the interest rate will be in effect by stating the maturity date. (See Appendix B, B-7--Sample Form.) For other fixed-rate accounts, institutions may use a date ('This rate will be in effect through May 4, 1995') or a period ('This rate will be in effect for at least 30 days').

3. Tiered-rate accounts. Each interest rate, along with the corresponding annual percentage yield for each specified balance level (or range of annual percentage yields, if appropriate), must be disclosed for tiered-rate accounts. (See Appendix A, Part I, Paragraph D.)

4. Stepped-rate accounts. A single composite annual percentage yield must be disclosed for stepped-rate accounts. (See Appendix A, Part I, Paragraph B.) The interest rates and the period of time each will be in effect also must be provided. When the initial rate offered for a specified time on a variable-rate account is higher or lower than the rate that would otherwise be paid on the account, the calculation of the annual percentage yield must be made as if for a stepped-rate account. (See Appendix A, Part I, Paragraph C.)

(b)(1)(ii) Variable rates

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(b)(1)(ii)(B)

1. Determining interest rates. To disclose how the interest rate is determined, institutions must:

i. Identify the index and specific margin, if the interest rate is tied to an index

ii. State that rate changes are within the institution's discretion, if the institution does not tie changes to an index

(b)(1)(ii)(C)

1. Frequency of rate changes. An institution reserving the right to change rates at its discretion must state the fact that rates may change at any time.

(b)(1)(ii)(D)

1. Limitations. A floor or ceiling on rates or on the amount the rate may decrease or increase during any time period must be disclosed. Institutions need not disclose the absence of limitations on rate changes.

(b)(2) Compounding and crediting

(b)(2)(ii) Effect of closing an account

1. Deeming an account closed. An institution may, subject to state or other law, provide in its deposit contracts the actions by consumers that will be

treated as closing the account and that will result in the forfeiture of accrued but uncredited interest. An example is the withdrawal of all funds from the account prior to the date that interest is credited.

(b)(3) Balance information

(b)(3)(ii) Balance computation method

1. Methods and periods. Institutions may use different methods or periods to calculate minimum balances for purposes of imposing a fee (the daily balance for a calendar month, for example) and accruing interest (the average daily balance for a statement period, for example). Each method and corresponding period must be disclosed.

(b)(3)(iii) When interest begins to accrue

1. Additional information. Institutions may disclose additional information such as the time of day after which deposits are treated as having been received the following business day, and may use additional descriptive terms such as 'ledger' or 'collected' balances to disclose when interest begins to accrue.

(b)(4) Fees

1. Covered fees. The following are types of fees that must be disclosed:

i. Maintenance fees, such as monthly service fees

ii. Fees to open or to close an account

iii. Fees related to deposits or withdrawals, such as fees for use of the institution's ATMs

iv. Fees for special services, such as stop-payment fees, fees for balance inquiries or verification of deposits, fees associated with checks returned unpaid, and fees for regularly sending to consumers checks that otherwise would be held by the institution

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2. Other fees. Institutions need not disclose fees such as the following:

i. Fees for services offered to account and nonaccount holders alike, such as travelers checks and wire transfers (even if different amounts are charged to account and nonaccount holders)

ii. Incidental fees, such as fees associated with state escheat laws, garnishment or attorneys fees, and fees for photocopying

3. Amount of fees. Institutions must state the amount and conditions under which a fee may be imposed. Naming and describing the fee (such as '$4.00 monthly service fee') will typically satisfy these requirements.

4. Tied-accounts. Institutions must state if fees that may be assessed against an account are tied to other accounts at the institution. For example, if an institution ties the fees payable on a NOW account to balances held in the NOW account and a savings account, the NOW account disclosures must state that fact and explain how the fee is determined.

(b)(5) Transaction limitations

1. General rule. Examples of limitations on the number or dollar amount of deposits or withdrawals that institutions must disclose are:

i. Limits on the number of checks that may be written on an account within a given time period

ii. Limits on withdrawals or deposits during the term of a time account

iii. Limitations required by Regulation D on the number of withdrawals permitted from money market deposit accounts by check to third parties each month. Institutions need not disclose reservations of right to require notices for withdrawals from accounts required by federal or state law.

(b)(6) Features of time accounts

(b)(6)(i) Time requirements

1. 'Callable' time accounts. In addition to the maturity date, an institution must state the date or the circumstances under which it may redeem a

consistent with the routing number on the checks. (See Sec. 229.36(f)(1)(i).)

8. A presenting bank may agree with a paying bank to present checks for same-day settlement by a deadline earlier or later than 8:00 a.m. (See Sec. 229.36(f)(1)(ii).)

D. The Board expects to review the types of variation by agreement that develop under this section and will consider whether it is necessary to limit certain variations.

XXIV. Section 229.38 Liability

A. 229.38(a) Standard of care; liability; measure of damages

1. The standard of care established by this section applies to any bank covered by the requirements of Subpart C of the regulation. Thus, the standard of care applies to a paying bank under ss 229.30 and 229.33, to a returning bank under Sec. 229.31, to a depositary bank under ss 229.32 and 229.33, to a bank erroneously receiving a returned **check** or written notice of nonpayment as depositary bank under Sec. 229.32(d), and to a bank **indorsing** a **check** under Sec. 229.35. The standard of care is similar to the standard imposed by U.C.C. 1-203 and 4-103(a) and includes a duty to act in good faith, as defined in Sec. 229.2(nn) of this regulation.

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2. A bank not meeting this standard of care is liable to the depositary bank, the depositary bank's customer, the owner of the check, or another party to the check. The depositary bank's customer is usually a depositor of a check in the depositary bank (but see Sec. 229.35(d)). The measure of damages stated derives from U.C.C. 4-103(e) and 4-202(c). This subpart does not absolve a collecting bank of liability to prior collecting banks under U.C.C. 4-201.

3. Under this measure of damages, a depositary bank or other person must show that the damage incurred results from the negligence proved. For example, the depositary bank may not simply claim that its customer will not accept a charge-back of a returned check, but must prove that it could not charge back when it received the returned check and could have charged back if no negligence had occurred, and must first attempt to collect from its customer. (See Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. 1978); Appliance Buyers Credit Corp. v. Prospect Nat'l Bank, 708 F.2d 290 (7th Cir. 1983).) Generally, a paying or returning bank's liability would not be reduced because the depositary bank did not place a hold on its customer's deposit before it learned of nonpayment of the check.

4. This paragraph also states that it does not affect a paying bank's liability to its customer. Under U.C.C. 4-402, for example, a paying bank is liable to its customer for wrongful dishonor, which is different from failure to exercise ordinary care and has a different measure of damages.

B. 229.38(b) Paying Bank's Failure To Make Timely Rreturn

1. Section 229.30(a) imposes requirements on the paying bank for expeditious return of a check and leaves in place the U.C.C. deadlines (as they may be modified by Sec. 229.30(c)), which may allow return at a different time. This paragraph clarifies that the paying bank could be liable for failure to meet either standard, but not for failure to meet both. The regulation intends to preserve the paying bank's accountability for missing its midnight or other deadline under the U.C.C., (e.g., sections 4-215 and 4-302), provisions that are not incorporated in this regulation, but may be useful in establishing the time

of final payment by the paying bank.

C. 229.38(c) Comparative negligence

1. This paragraph establishes a 'pure' comparative negligence standard for liability under Subpart C of this regulation. This comparative negligence rule may have particular application where a paying or returning bank delays in returning a check because of difficulty in identifying the depositary bank. Some examples will illustrate liability in such cases. In each example, it is assumed that the returned check is received by the depositary bank after it has made funds available to its customer, that it may no longer recover the funds from its customer, and that the inability to recover the funds from the customer is due to a delay in returning the check contrary to the standards established by ss 229.30(a) or 229.31(a).

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2. Examples.

a. If a depositary bank fails to use the **indorsement** required by this regulation, and this failure is caused by a failure to exercise ordinary care, and if a paying or returning bank is delayed in returning the **check** because additional time is required to identify the depositary bank or find its routing number, the paying or returning bank's liability to the depositary bank would be reduced or eliminated.

b. If the depositary bank uses the standard **indorsement,** but that **indorsement** is obscured by a subsequent collecting bank's **indorsement,** and a paying or returning bank is delayed in returning the **check** because additional time was required to identify the depositary bank or find its routing number, the paying or returning bank may not be liable to the depositary bank because the delay was not due to its negligence. Nonetheless, the collecting bank may be liable to the depositary bank to the extent that its negligence in **indorsing** the **check** caused the paying or returning bank's delay.

c. If a depositary bank accepts a **check** that has printing, a carbon band, or other material on the back of the **check** that existed at the time the **check** was issued, and the depositary bank's **indorsement** is obscured by the printing, carbon band, or other material, and a paying or returning bank is delayed in returning the **check** because additional time was required to identify the depositary bank, the returning bank may not be liable to the depositary bank because the delay was not due to its negligence. Nonetheless, the paying bank may be liable to the depositary bank to the extent that the printing, carbon band, or other material caused the delay.

D. 229.38(d) Responsibility for Certain Aspects of Checks

1. Responsibility for back of **check.** The **indorsement** standard in Sec. 229.35 is most effective if the back of the **check** remains **clear** of other matter that may obscure bank **indorsements.** Because bank **indorsements** are usually applied by automated equipment, it is not possible to avoid pre-existing matter on the back of the **check.** For example, bank **indorsements** are not required to avoid a carbon band or printed, stamped, or written terms or notations on the back of the **check.** Accordingly, this provision places responsibility on the paying bank or depositary bank, as appropriate, for keeping the back of the **check clear** for bank **indorsements** during forward collection and return.

2. Responsibility for payable-through checks.

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a. This paragraph provides that the bank by which a payable-through check is payable is liable for damages under paragraph (a) of this section to the extent that the check is not returned through the payable-through bank as quickly as would have been necessary to meet the requirements of Sec. 229.30(a)(1) (the 2-day/4-day test) had the bank by which it is payable received the check as paying bank on the day the payable-through bank received it. The location of the bank by which a check is payable for purposes of the 2-day/4-day test may be determined from the location or the first four digits of the routing number of the bank by which the check is payable. This information should be stated on the check. (See Sec. 229.36(e) and accompanying Commentary.) Responsibility under paragraph (d)(2) does not include responsibility for the time required for the forward collection of a check to the payable-through bank.

b. Generally, liability under paragraph (d)(2) will be limited in amount. Under Sec. 229.33(a), a paying bank that returns the amount of $2,500 or more is not returned through the payable-through bank as quickly as would have been required had the check been received by the bank by which it is payable, the depositary bank should not suffer damages unless it has not received timely notice of nonpayment. Thus, ordinarily the bank by which a payable-through check is payable would be liable under paragraph (a) only for checks in amounts up to $2,500, and the paying bank would be responsible for notice of nonpayment for checks in the amount of $2,500 or more.

3. Responsibility under paragraphs (d)(1) and (d)(2) is treated as negligence for comparative negligence purposes, and the contribution to damages under paragraphs (d)(1) and (d)(2) is treated in the same way as the degree of negligence under paragraph (c) of this section.

E. 229.38(e) Timeliness of Action

1. This paragraph excuses certain delays. It adopts the standard of U.C.C. 4-109(b).

F. 229.38(f) Exclusion

1. This paragraph provides that the civil liability and class action provisions, particularly the punitive damage provisions of sections 611(a) and (b), and the bona fide error provision of 611(c) of the Act (12 U.S.C. 4010(a), (b), and (c)) do not apply to regulatory provisions adopted to improve the efficiency of the payments mechanism. Allowing punitive damages for delays in the return of checks where no actual damages are incurred would only encourage litigation and provide little or no benefit to the check collection system. In view of the provisions of paragraph (a), which incorporate traditional bank collection standards based on negligence, the provision on bona fide error is not included in Subpart C.

G. 229.38(g) Jurisdiction

1. The Act confers subject matter jurisdiction on courts of competent jurisdiction and provides a time limit for civil actions for violations of this subpart.

H. 229.38(h) Reliance on Board Rulings

1. This provision shields banks from civil liability if they act in good faith in reliance on any rule, regulation, or interpretation of the Board, even if it were subsequently determined to be invalid. Banks may rely on the

Commentary to this regulation, which is issued as an official Board interpretation, as well as on the regulation itself.

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XXV. Section 229.39 Insolvency of Bank

A. Introduction

1. These provisions cover situations where a bank becomes insolvent during collection or return and are derived from U.C.C. 4-216. They are intended to apply to all banks.

B. 229.39(a) Duty of Receiver

1. This paragraph requires a receiver of a closed bank to return a **check** to the prior bank if it does not pay for the **check.** This permits the prior bank, as holder, to pursue its claims against the closed bank or prior **indorsers** on the **check.**

C. 229.39(b) Preference Against Paying or Depositary Bank

1. This paragraph gives a bank a preferred claim against a closed paying or depositary bank that finally pays a check without settling for it. If the bank with a preferred claim under this paragraph recovers from a prior bank or other party to the check, the prior bank or other party to the check is subrogated to the preferred claim.

D. 229.39(c) Preference Against Paying, Collecting, or Depositary Bank

1. This paragraph gives a bank a preferred claim against a closed collecting, paying, or returning bank that receives settlement but does not settle for a check. (See Commentary to Sec. 229.35(b) for discussion of prior and subsequent banks.) As in the case of Sec. 229.39(b), if the bank with a preferred claim under this paragraph recovers from a prior bank or other party to the check, the prior bank or other party to the check is subrogated to the preferred claim.

E. 229.39(d) Preference Against Presenting Bank

1. This paragraph gives a paying bank a preferred claim against a closed presenting bank in the event that the presenting bank breaches an amount or encoding warranty as provided in Sec. 229.34(c)(1) or (3) and does not reimburse the paying bank for adjustments for a settlement made by the paying bank in excess of the value of the checks presented. This preference is intended to have the effect of a perfected security interest and is intended to put the paying bank in the position of a secured creditor for purposes of the receivership provisions of the Federal Deposit Insurance Act and similar provisions of state law.

F. 229.39(e) Finality of Settlement

1. This paragraph provides that insolvency does not interfere with the finality of a settlement, such as a settlement by a paying bank that becomes final by expiration of the midnight deadline.

XXVI. Section 229.40 Effect on Merger Transaction

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A. When banks merge, there is normally a period of adjustment required before their operations are consolidated. To allow for this adjustment period, the regulation provides that the merged banks may be treated as separate banks for a period of up to one year after the consummation of the transaction. The term merger transaction is defined in Sec. 229.2(t). This rule affects the status of the combined entity in a number of areas in this subpart. For example:

1. The paying bank's responsibility for expeditious return (s 229.30).
2. The returning bank's responsibility for expeditious return (s 229.31).
3. Whether a returning bank is entitled to an extra day to qualify a return that will be delivered directly to a depositary bank that has merged with the returning bank (s 229.31(a)).
4. Where the depositary bank must accept returned checks (s 229.32(a)).
5. Where the depositary bank must accept notice of nonpayment (s 229.33(c)).
6. Where a paying bank must accept presentment of checks (s 229.36(b)).

XXVII. Section 229.41 Relation to State Law

A. This section specifies that state law relating to the collection of checks is preempted only to the extent that it is inconsistent with this regulation. Thus, this regulation is not a complete replacement for state laws relating to the collection or return of checks.

XXVIII. Section 229.42 Exclusions

A. Checks drawn on the United States Treasury, U.S. Postal Service money orders, and checks drawn on states and units of general local government that are presented directly to the state or unit of general local government and that are not payable through or at a bank are excluded from the coverage of the expeditious return and notice of nonpayment requirements of Subpart C of this regulation. Other provisions of this subpart continue to apply to the checks. This exclusion does not apply to checks drawn by the U.S. government on banks.

XXIX. Appendix C --Model Forms, Clauses, and Notices

A. Introduction

1. Appendix C contains model forms, clauses, and notices that may be used by banks to meet their disclosure responsibilities under the regulation. Banks using the model forms, clauses, and notices properly will be in compliance with the disclosure requirements of the regulation.
2. Certain information that must be inserted by a bank using the forms is italicized within parentheses in the text of the forms. Some forms contain alternative clauses, and these are set forth in brackets and separated by the word 'or.' Banks may make certain changes in the format or content of the model forms and delete material that is inapplicable without losing the Act's protection from liability for banks that use the forms properly. For example, if a bank does not take advantage of the Sec. 229.13 exceptions, it may delete

the material relating to those exceptions. The rearrangement of the model forms, clauses, or notices may not be so extensive, however, as to affect the substance, clarity, or meaningful sequence of the forms. Acceptable changes include, for example:

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a. Using 'customer' and 'bank' instead of pronouns.

b. Not using bold type for headings.

c. Incorporating certain state law 'plain English' requirements.

3. Shorter time periods for availability may always be substituted for time periods used in the model forms, clauses, or notices.

4. Banks may also add information related to their availability policies. For example, a bank might indicate that although funds have been made available to a customer and the customer has withdrawn them, the customer is still responsible for problems with the deposit, such as checks that were deposited being returned unpaid. Or a bank could provide in its disclosure a telephone number to be used if a customer has an inquiry regarding a deposit.

5. Banks are cautioned against using the forms, clauses, or notices without reviewing their own policies and practices, as well as state and federal laws regarding the time periods for availability of specific types of checks. A bank using a model form will be in compliance with the Act and the regulation only if its disclosures correspond to the bank's availability policy.

B. Models

1. Models C-1 through C-5 generally.

a. These forms are models for the specific availability policy disclosure described in Sec. 229.16 of the regulation. The forms accommodate a variety of availability policies, ranging from policies of next-day availability to holds on a blanket basis up to the maximum time allowed in the regulation. Model C-3 reflects the additional disclosures discussed in ss 229.16(b) and (c) for banks that have a policy of extending availability times on a case-by-case basis.

b. As already noted, there are several places in the forms where information must be inserted. This information includes the bank's name and cut-off times, limitations relating to next-day availability, and the first four digits of routing numbers for local banks. In disclosing when funds will be available for withdrawal, the bank must insert the original number (such as first, second, etc.) of the business day the funds will become available.

c. Models C-1 through C-5 generally do not reflect any optional provisions of the regulation, or those that apply only to certain banks. Instead, disclosures for these provisions are included in the model clauses (Models C-6 through C-11). A bank using one of the model forms should also consider whether it must incorporate one or more of the model clauses.

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d. While Sec. 229.10(b) of the regulation requires next-day availability for electronic payments, Treasury regulations (31 CFR part 210) and ACH association rules require that preauthorized credits (direct deposits) be made available on the day the bank receives the funds. Model Forms C-1 through C-5 reflect these rules. Wire transfers, however, are not governed by Treasury or ACH rules, but banks generally make funds from wire transfers available on the day received or on the business day following receipt. Banks should ensure that their disclosures reflect the availability given in most cases for wire transfers.

e. Banks that have used earlier versions of the model forms, clauses, or notices (such as those forms that gave Social Security benefits and payroll

payments as examples of preauthorized credits available the day after deposit) are protected from civil liability under Sec. 229.21(e). Banks are encouraged, however, to use current versions of the forms when reordering or reprinting supplies of forms.

2. Model C-1. A bank may use this form when its policy is to make funds from all deposits available on the first business day after a deposit is made. This form may also be used by banks that provide immediate availability by substituting the word 'immediately' in place of 'on the first business day after the day we receive your deposit.'

3. Model C-2. A bank may use this form when its policy is to make funds from all deposits available to its customers on the first business day after the deposit is made, and to reserve the right to invoke the new account and other exceptions in Sec. 229.13 of the regulation.

4. Model C-3. A bank may use this form when its policy, in most cases, is to make funds from all types of deposits available the day after the deposit is made, but to delay availability on some deposits on a case-by-case basis up to the maximum time periods allowed under the regulation. A bank using this form also reserves the right to invoke the exceptions listed in Sec. 229.13 of the regulation. A bank reserving the right to impose the cash withdrawal limitation in Sec. 229.12(d) should disclose that funds may not be available until the sixth (rather than fifth) business day in the first paragraph under the heading 'Longer Delays May Apply.'

5. Model C-4. A bank may use this form when its policy is the same as that outlined in Model C-5. The only difference between Model C-5 and Model C-4 is that in the latter a chart showing the bank's availability policy for local and nonlocal checks is substituted for the narrative description in the former.

6. Model C-5. A bank may use this form when its policy is to impose delays to the full extent allowed by Sec. 229.12 and to reserve the right to invoke the Sec. 229.13 exceptions.

7. Models C-6 through C-11 generally. These model clauses must be incorporated into a bank's specific availability policy disclosure under certain circumstances. The commentary to each clause indicates when the clause is required.

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8. Model C-6. This clause must be incorporated in the specific availability policy disclosure by banks that reserve the right to place a hold on funds already on deposit when they cash a check for the customer, as discussed under Sec. 229.19(e).

9. Model C-7. This clause must be incorporated in the specific availability disclosure by banks that reserve the right to place a hold on funds in an account of the customer other than the account into which the deposit is made, as discussed in Sec. 229.19(e).

10. Model C-8. This clause must be incorporated in the specific availability policy disclosure by banks in check processing regions where the availability schedules for certain nonlocal checks have been reduced, as described in Appendix B of the regulation. Banks using Model C-5 may insert this clause at the conclusion of the discussion titled 'Nonlocal checks.'

11. Model C-9. This clause must be incorporated in the specific availability policy disclosure by banks that reserve the right to delay availability of deposits at nonproprietary ATMs until the fifth business day following the date of deposit, as permitted by section 229.12(f). A bank must choose among the alternative language based on how it chooses to differentiate between proprietary and nonproprietary ATMs, as required under Sec. 229.16(b)(5).

12. Model C-10. This clause may be used to disclose cash withdrawal

limitations under Sec. 229.12. Banks using Model C-5 to disclose availability may substitute this clause for the sections titled 'Local checks' and 'Nonlocal checks.'

13. Model C-11. This clause must be incorporated in the specific availability policy disclosure by credit unions seeking to satisfy the notice requirement of Sec. 229.14(b). This model clause is only an example of a hypothetical policy. Credit unions may follow any policy for accrual provided the method of accruing interest is the same for cash and check deposits.

14. Models C-12 through C-21 generally. These forms are models for various notices required by the regulation.

15. Model C-12. This form satisfies the written notice required under Sec. 229.13(g) when a bank places a hold based on a Sec. 229.13 exception. If a hold is being placed on more than one check in a deposit, each check need not be described, but if different reasons apply, each reason must be indicated. A bank may use the actual date when funds will be available for withdrawal rather than the number of the business day following the day of deposit. The bank must incorporate in the notice the material set out in brackets if it imposes overdraft fees after invoking a Sec. 229.13 exception.

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16. Model C-13. This form satisfies the same requirement as Model C-12, and the same instructions apply, except that Model C-13 is for use by a bank that invokes the reasonable cause exception in Sec. 229.13. The form provides the bank with a list of specific reasons that may be given for invoking the exception. If a hold is being placed on more than one check in a deposit, each check must be described separately, and if different reasons apply, each reason must be indicated. Banks may disclose the reason for their doubting collectibility by checking the appropriate reason on the form. If the 'Other' category is checked, the reason must be given.

17. Model C-14. This form satisfies the notice requirements of Sec. 229.13(g)(2).

18. Model C-15. This form satisfies the notice requirements of Sec. 229.13(g)(3).

19. Model C-16. This form satisfies the notice required under Sec. 229.16(b)(2) when a bank with a case-by-case hold policy imposes a delay on a deposit. This notice does not require a statement of the specific reason for the hold, as is the case when a Sec. 229.13 exception hold is placed. A bank may specify the actual date when funds will be available for withdrawal rather than the number of the business day following the day of deposit when funds will be available. The bank must incorporate in the notice the material set out in brackets if it imposes overdraft fees after invoking a case-by-case hold.

20. Model C-17 and C-18. Either of these forms satisfies the notice requirement of Sec. 229.18(b) (notice at locations where employees accept consumer deposits). Model C-17 is based on an availability policy that is the same as the schedule described in Sec. 229.12 of the regulation and the policy reflected in models C-4 and C-5. Model C-18 may be used by a bank with a case-by-case availability policy.

21. Model C-19. This form satisfies the ATM notice requirement of Sec. 229.18(c)(1).

22. Model C-20. This form satisfies the ATM notice requirement of Sec. 229.18(c)(2) when receipt of deposits at off-premise ATMs is delayed under Sec. 229.19(a)(4). It is based on collection of deposits once a week. If collections occur more or less frequently, the description of when deposits are received must be adjusted accordingly.

23. Model C-21. This form satisfies the notice requirements of Sec.

229.18(a) for deposit slips.

[53 FR 31293, Aug. 18, 1988; 53 FR 44325, Nov. 2, 1988; 54 FR 13851, April 6, 1989; 54 FR 32047, Aug. 4, 1989; 55 FR 21856, May 30, 1990; 55 FR 50818, Dec. 11, 1990; 56 FR 7802, Feb. 26, 1991; 57 FR 3280, Jan. 29, 1992; 57 FR 36598, 36601, Aug. 14, 1992; 57 FR 46973-46975, Oct. 14, 1992; 57 FR 52719, Nov. 5, 1992; 60 FR 51672, Oct. 3, 1995]

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<<PART 229
--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.
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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix F to Part 229--Official Board Interpretations; Preemption Determinations

Uniform Commercial Code, Section 4-213(5)

Section 4-213(5) of the Uniform Commercial Code ('U.C.C.') provides that money deposited in a bank is available for withdrawal as of right at the opening of business of the banking day after deposit. Although the language 'deposited in a bank' is unclear, arguably it is broader than the language 'made in person to an employee of the depositary bank', which conditions the next-day availability of cash under Regulation CC (s 229.10(a)(1)). Under Regulation CC, deposits of cash that are not made in person to an employee of the depositary bank must be made available by the second business day after the banking day of deposit (s 229.10(a)(2)). Therefore, this provision of the U.C.C. may call for the availability of certain cash deposits in a shorter time than provided in Regulation CC.

This provision of the U.C.C., however, is subject to Section 4-103(1), which provides, in part, that 'the effect of the provisions of this Article may be varied by agreement * * *.' (The Regulation CC funds availability requirements may not be varied by agreement.) U.C.C. Section 4-213(5) supersedes the Regulation CC provision in Sec. 229.10(a)(2), but a depositary bank may not agree with its customer under section 4-103(1) of the Code to extend availability beyond the time periods provided in Sec. 229.10(a) of Regulation CC.

California

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC preempt the provisions of California law concerning availability of funds. This preemption determination specifies those provisions of the California funds availability law that supersede the Act and Regulation CC. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

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California has four separate sets of regulations establishing maximum

availability schedules. The regulations applicable to commercial banks and branches of foreign banks located in California (Cal. Admin. Code tit. 10, ss 10.190401-10.190402) were promulgated by the Superintendent of Banks. The regulations applicable to savings banks and savings and loan associations (Cal. Admin. Code tit. 10, ss 106.200-106.202) were adopted by the Savings and Loan Commissioner. The regulations applicable to credit unions (Cal. Admin. Code tit. 10, section 901) and to industrial loan companies (Cal. Admin. Code tit. 10, section 1101) were adopted by the Commissioner of Corporations.

All the regulations were adopted pursuant to California Financial Code Sec. 866.5 and California Commercial Code section 4213(4)(a), under which the appropriate state regulatory agency for each depository institution must issue administrative regulations to define a reasonable time for permitting customers to draw on items received for deposit in the customer's account. California Financial Code section 867 also establishes availability periods for funds deposited by cashier's check, certified check, teller's check, or depository check under certain circumstances. Finally, California Financial Code Sec. 866.2 establishes disclosure requirements.

The Board's determination with respect to these California laws and regulations governing the funds availability requirements applicable to depository institutions in California are as follows.

Commercial Banks and Branches of Foreign Banks

Coverage

The California State Banking Department regulations, which apply to California state commercial banks, California national banks, and California branch offices of foreign banks, provide that a depositary bank shall make funds deposited into a deposit account available for withdrawal as provided in Regulation CC with certain exceptions. The funds availability schedules in Regulation CC apply only to 'accounts' as defined in Regulation CC, which generally consist of transaction accounts. The California funds availability law and regulations apply to accounts as defined by Regulation CC as well as savings accounts (other than time accounts), as defined in the Board's Regulation D (12 CFR 204.2(d)). (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC in certain circumstances.)

Availability Schedules

Temporary schedule. Regulation CC provides that, until September 1, 1990, nonlocal checks must be made available for withdrawal by the seventh business day after the banking day of deposit, except for certain nonlocal checks listed in appendix B-1, which must be made available within a shorter time (by the fifth business day following deposit for those California checks listed). Under the temporary schedule in the California regulations, a depositary bank with a four-digit routing symbol of 1210 ('1210 bank') or of 1220 ('1220 bank') that receives for deposit a check drawn on a nonlocal, in-state commercial bank or foreign bank branch 1 must make the funds available for withdrawal by the fourth business day after the day of deposit. The California regulations provide that 1210 and 1220 banks must make deposited checks drawn on nonlocal in-state thrifts (defined as savings and loan associations, savings banks, and credit unions) available by the fifth business day after deposit. In addition, California law provides that all other depositary banks must make deposited

checks drawn on a nonlocal in-state commercial bank or foreign bank branch available by the fifth business day after deposit and checks drawn on nonlocal in-state thrifts available by the sixth business day after deposit. To the extent that these schedules provide for shorter holds than Regulation CC and its appendix B-1, the state schedules supersede the federal schedules.2 For example, the California four-day schedule that applies to checks drawn on in-state nonlocal commercial banks or foreign bank branches and deposited in a 1210 or 1220 bank would be shorter than and would supersede the federal schedules.

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1 The California regulation uses the term 'paying bank' when describing the institution on which these checks are drawn, but does not define 'paying bank' or 'bank.' Regulation CC's definitions of 'paying bank' and 'bank' include savings institutions and credit unions as well as commercial banks and branches of foreign banks. However, because the California regulation makes separate provisions for checks drawn on savings institutions and credit unions, the Board concludes that the term 'paying bank,' as used in the California regulation, includes only commercial banks and foreign bank branches.

2 Appendix B-1 of Regulation CC provides that the federal schedules will be the same as the California schedules (5 days) in the following cases: A depositary bank bearing a 1210 routing number receiving for deposit checks bearing a 3220 or a 3223 routing number, and a depositary bank bearing a 1220 routing number receiving for deposit checks bearing a 3210 routing number. In the cases where federal and state law are the same, the state law is not preempted by, nor does it supersede, the federal law.

The California regulations do not specify whether the state schedules apply to deposits of checks at nonproprietary ATMs. Under the temporary schedules in Regulation CC, deposits at nonproprietary ATMs must be made available for withdrawal by the seventh business day following deposit. To the extent that the California schedules provide for shorter availability for deposits at nonproprietary ATMs, they would supersede the temporary schedule in Regulation CC for deposits at nonproprietary ATMs specified in Sec. 229.11(d).

Permanent schedule. Regulation CC provides that, as of September 1, 1990, nonlocal checks must be made available for withdrawal by the fifth business day after the banking day of deposit. Under the permanent schedule in the California regulations, a depositary bank with a four-digit routing symbol of 1210 or of 1220 that receives for deposit a check drawn on a nonlocal, in-state commercial bank or foreign bank branch must make the funds available for withdrawal by the fourth business day after the day of deposit. These state schedules provide for shorter hold periods than and thus supersede the federal schedules.

Second-day availability. Section 867 of the California Financial Code requires depository institutions to make funds deposited by cashier's check, teller's check, certified check, or depository check available for withdrawal on the second business day following deposit, if certain conditions are met. The Regulation CC next-day availability requirement for cashier's checks and teller's checks applies only to those checks issued to a customer of the bank or acquired from the bank for remittance purposes. To the extent that the state second-day availability requirement applies to cashier's and teller's checks

issued to a non-customer of the bank for other than remittance purposes, the state two-day requirement supersedes the federal local and nonlocal schedules.

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Availability at start of day. The California regulations do not specify when during the day funds must be made available for withdrawal. Section 229.19(b) of Regulation CC provides that funds must be made available at the start of the business day. In those cases where federal and state law provide for holds for the same number of days, to the extent that the California regulations allow funds to be made available later in the day than does Regulation CC, the federal law would preempt state law.

Exceptions to the availability schedules. Under the state preemption standards of Regulation CC (see Sec. 229.20(c) and accompanying Commentary), for deposits subject to the state availability schedules, a state exception may be used to extend the state availability schedule up to the federal availability schedule. Once the deposit is held up to the federal availability schedule limit under a state exception, the depositary bank may further extend the hold under any federal exception that can be applied to the deposit. If no state exceptions exist, then no exceptions holds may be placed on deposits covered by state schedules. Thus, to the extent that California law provides for exceptions to the California schedules that supersede Regulation CC, those exceptions may be applied in order to extend the state availability schedules up to the federal availability schedules or such later time as is permitted by a federal exception.

Disclosures

California law (Cal. Fin. Code Sec. 866.2) requires depository institutions to provide written disclosures of their general availability policies to potential customers prior to opening any deposit account. The law also requires that preprinted deposit slips and ATM deposit envelopes contain a conspicuous summary of the general policy. Finally, the law requires depository institutions to provide specific notice of the time the customer may withdraw funds deposited by check or similar instrument into a deposit account if the funds are not available for immediate withdrawal.

Section 229.20(c)(2) of Regulation CC provides that inconsistency may exist when a state law provides for disclosures or notices concerning funds availability relating to accounts. California Financial Code Sec. 866.2 requires disclosures that differ from those required by Regulation CC and, therefore, is preempted to the extent that it applies to 'accounts' as defined in Regulation CC. The state law continues to apply to savings accounts and other accounts not governed by Regulation CC disclosure requirements.

Savings Institutions

Coverage

The California Department of Savings and Loan regulations, which apply to California savings and loan associations and California savings banks, provide that a depositary bank shall make funds deposited into a transaction or non-transaction account available for withdrawal as provided in Regulation CC. The funds availability schedules in Regulation CC apply only to 'accounts' as defined in Regulation CC, which generally consist of transaction accounts. The California funds availability law and regulations apply to accounts as defined by Regulation CC as well as savings accounts as defined in the Board's

Regulation D (12 CFR 204.2(d)). (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC in certain circumstances.)

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Availability Schedules

Second-day availability. Section 867 of the California Financial Code requires depository institutions to make funds deposited by cashier's check, teller's check, certified check, or depository check available for withdrawal on the second business day following deposit, if certain conditions are met. The Regulation CC next-day availability requirement for cashier's checks and teller's checks applies only to those checks issued to a customer of the bank or acquired from the bank for remittance purposes. To the extent that the state second-day availability requirement applies to cashier's and teller's checks issued to a non-customer of the bank for other than remittance purposes, the state two-day requirement supersedes the federal local and nonlocal schedules.

Temporary and permanent schedules. Other than the provisions of Section 867 discussed above, California law incorporates the Regulation CC availability requirements with respect to deposits to accounts covered by Regulation CC. Because the state requirements are consistent with the federal requirements, the California regulation is not preempted by, nor does it supersede, the federal law.

Disclosures

California law (Cal. Fin. Code Sec. 866.2) requires depository institutions to provide written disclosures of their general availability policies to potential customers prior to opening any deposit account. The law also requires that preprinted deposit slips and ATM deposit envelopes contain a conspicuous summary of the general policy. Finally, the law requires depository institutions to provide specific notice of the time the customer may withdraw funds deposited by check or similar instrument into a deposit account if the funds are not available for immediate withdrawal. Section 229.20(c)(2) of Regulation CC provides that inconsistency may exist when a state law provides for disclosures or notices concerning funds availability relating to accounts. To the extent that California Financial Code Sec. 866.2 requires disclosures that differ from those required by Regulation CC and apply to 'accounts' as defined in Regulation CC (generally, transaction accounts), the California law is preempted by Regulation CC.

The Department of Savings and Loan regulations provide that for those non-transaction accounts covered by state law but not by federal law, disclosures in accordance with Regulation CC will be deemed to comply with the state law disclosure requirements. To the extent that the Department of Savings and Loan regulations permit reliance on Regulation CC disclosures for transaction accounts and to the extent the state regulations survive the preemption of California Financial Code Sec. 866.2, they are not preempted by, nor do they supersede, the federal law. The state law continues to apply to savings accounts and other non-transaction accounts not governed by Regulation CC disclosure requirements.

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Credit Unions and Industrial Loan Companies

Each credit union and federally-insured industrial loan company that maintains an office in California for the acceptance of deposits must make funds deposited by check available for withdrawal in accordance with the following table:

	Availability	
	Credit Union	Industrial Loan Company
$100 or less checks; U.S. Treasury checks; state/local gov't checks	1st day	1st day
On U.S. checks; cashier's/certifies/teller's/depository checks	2nd day	2nd day
In-state checks	6th day	6th day
out-of-state checks	10th day	12th day

Note: These time periods are stated in terms of availability for withdrawal not later than the Xth business day following the banking day of deposit to facilitate comparison with Regulation CC. State regulations are stated in terms of availability at the start of the business day subsequent to the number of days specified in the regulation.

Coverage

The California law and regulations govern the availability of funds to 'demand deposits, negotiable order of withdrawal draft accounts, savings deposits subject to automatic transfers, share draft accounts, and all savings deposits and share accounts, other than time deposits.' (California Financial Code section 886(b)) The federal preemption of state funds availability laws only applies to 'accounts' subject to Regulation CC, which generally includes transaction accounts. Thus, the California funds availability regulations continue to apply to deposits in savings and other accounts (such as accounts in which the account-holder is another bank) that are no 'accounts' under Regulation CC. (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC in certain circumstances.)

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The California law applies to any 'Item' (California Financial Code Sec. 866.5 and California Commercial Code section 4213(4)(a)). The California Commercial Code defines 'item' to mean 'any instrument for the payment of money even though it is not negotiable * * *' (Cal. Com. Code section 4104(g)). This term is broader in scope than the definition of 'check' in the Act and

Regulation CC. The Commissioner's regulations, however, define the term 'item' to include checks, negotiable orders of withdrawal, share drafts, warrants, and money orders. As limited by the state regulations, the state law applies only to instruments that are also 'checks' as defined in Sec. 229.2(k) of Regulation CC.

Availability Schedules

Temporary schedule. The California regulations provide that in-state nonlocal checks must be made available for withdrawal not later than the sixth business day following deposit. This time period is shorter than the seventh business day availability required for nonlocal checks under Sec. 229.11(c) of Regulation CC, although it is not shorter than the schedules for nonlocal checks set forth in Sec. 229.11(c)(2) and Appendix B-1 of Regulation CC. Thus, the state scheduled for in-state nonlocal checks supersede the federal schedule to the extent that they apply to an item payable by a California institution that is defined as a nonlocal check under Regulation CC, and is not subject to reduced schedules under Sec. 229.11(c)(2) and Appendix B-1.

Under the California regulations, credit unions and industrial loan companies must provide next-day availability to **first-indorsed** items issued by any federally-insured institution. This regulatory requirement, however, has been superseded by section 867 of the California Financial Code, which requires depository institutions to make funds deposited by cashier's **check,** teller's **check,** certified **checks,** or depository **check** available for withdrawal on the second business day following deposit, if certain conditions are met. This requirement became effective January 1, 1988.

The Regulation CC next-day availability requirement for cashier's checks and teller's checks applies only to those checks issued for remittance purposes. To the extent that the state second business day availability requirement applies to cashier's and teller's checks issued for other than remittance purposes, the state two-day requirement supersedes the federal local and nonlocal schedules.

The California regulations do not specify whether they apply to deposits of checks at nonproprietary ATMs. Under the temporary schedule in Regulation CC, deposits at nonproprietary ATMs must be made available for withdrawal at the start of the seventh business day after deposit. To the extent that the California schedules provide for shorter availability for deposits at nonproprietary ATMs, they would supersede the temporary schedule in Regulation CC for deposits at nonproprietary ATMs specified in Sec. 229.11(d).

Permanent schedule. Under the California regulations, credit unions and industrial loan companies must provide next-day availability to **first-indorsed** items issued by any federally-insured institution. This regulatory requirement, however, has been superseded by section 867 of the California Financial Code, which requires depository institutions to make funds deposited by cashier's **check,** teller's **check,** certified **check,** or depository **check** available for withdrawal on the second business day following deposit, if certain conditions are met. This requirement became effective January 1, 1988.

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The Regulation CC next-day availability requirement for cashier's and teller's checks applies only to those checks issued for remittance purposes. To the extent that the state second business day availability requirement applies to cashier's and teller's checks issued for other than remittance purposes, the state two-day requirement supersedes the federal local and nonlocal schedules.

Next-day availability. Credit unions and industrial loan companies in California are required to give next-day availability to items drawn by the

State of California or any of its departments, agencies, or political subdivisions. California law supersedes the federal law in that the state law does not condition next-day availability on receipt at a staffed teller station or use of a special deposit slip.

California credit unions and industrial loan companies must provide second business day availability to checks drawn on the depositary bank. Regulation CC requires next-day availability for checks deposited in a branch of the depositary bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check processing region. Thus, generally, the Regulation CC rule for availability of on us checks preempts the California regulations. To the extent, however, that an on us check is (1) drawn on an out-of-state branch of the depositary bank that is not in the same check processing region as the branch in which it was deposited, or (2) deposited at an off-premises ATM or another facility of the depositary bank that is not considered a branch under federal law, the state regulation supersedes the Regulation CC availability requirements.

Exceptions to the availability schedules. California law provides exceptions to the state availability schedules for large deposits, new accounts, repeated overdrafters, doubtful collectibility, foreign items, and emergency conditions. In all cases where the federal availability schedule preempts the state schedule, only the federal exceptions will apply. For deposits that are covered by the state availability schedule (e.g., in-state nonlocal checks under the temporary schedule; cashier's or teller's checks that are not deposited with a special deposit slip or at a staff teller station), the state exceptions may be used to extend the state availability schedule up to the federal availability schedule. Once the deposit is held up to the federal availability limit under a state exception, the depositary bank may further extend the hold under any federal exception that can be applied to the deposit. Any time a depositary bank invokes an exception to extend a hold beyond the time periods otherwise permitted by law, it must give notice of the extended hold to its customer in accordance with Sec. 229.13(g) of Regulation CC.

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Business day/banking day. The definitions of 'business day' and 'banking day' in the California regulations are preempted by the Regulation CC definition of those terms. Thus, for determining the permissible hold under the California schedules that supersede the Regulation CC schedule, deposits are considered made on the specified number of 'business days' following the 'banking day' of deposit.

Disclosures

California law (Cal. Fin. Code Sec. 866.2) requires depository institutions to provide written disclosures of their general availability policies to potential customers prior to opening any deposit account. The law also requires that preprinted deposit slips and ATM deposit envelopes contain a conspicuous summary of the general policy. Finally, the law requires a depository institution to provide specific notice of the time the customer may withdraw funds deposited by check or similar instrument into a deposit account if the funds are not available for immediate withdrawal.

Section 229.20(c)(2) of Regulation CC provides that inconsistency may exist when a state law provides for disclosures or notices concerning funds availability relating to accounts. California Financial Code Sec. 866.2 requires disclosures that differ from those required by Regulation CC, and therefore is preempted to the extent that it applies to 'accounts' as defined in

Regulation CC. The state law continues to apply to savings accounts and other accounts not governed by Regulation CC disclosure requirements.

Connecticut

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC, preempt provisions of Connecticut law relating to the availability of funds. This preemption determination specifies those provisions of the Connecticut funds availability law that supersede the Act and Regulation CC. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

In 1987, Connecticut amended its statute governing funds availability (Conn. Gen. Stat. section 36-9v), which requires Connecticut depository institutions to make funds deposited in a checking, time, interest, or savings account available for withdrawal with specified periods.

Generally, the Connecticut statute, as amended, provides that items deposited in a checking, time, interest, or savings account at a depository institution must be available for withdrawal in accordance with the following table:

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	Availability
On U.S. checks	2nd day
In-state checks	4th day
Out-of-state checks	6th day

Exceptions to the schedules are provided for items received for deposit for the purpose of opening an account and for items that the depositary bank has reason to believe will not clear. The Connecticut statute also requires availability policy disclosures to depositors in the form of written notices and notices posted conspicuously at each branch.

Coverage

The Connecticut statute governs the availability of funds deposited in savings and time accounts, as well as 'accounts' as defined in Sec. 229.2(a) of Regulation CC. The federal preemption of state funds availability requirements only applies to 'accounts' subject to Regulation CC, which generally consist of transaction accounts. Regulation CC does not affect the Connecticut statute to the extent that the state law applies to deposits in savings and other accounts (including transaction accounts where the account holder is a bank, foreign bank or the U.S. Treasury) that are not 'accounts' under Regulation CC. (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC, in certain circumstances.)

The Connecticut statute applies to 'items' deposited in accounts. This term encompasses instruments that are not defined as 'checks' in Regulation CC (s 229.2(k)), such as nonnegotiable instruments, and are therefore not subject to Regulation CC's provisions governing funds availability. Those items that are subject to Connecticut law but are not subject to Regulation CC will continue to be covered by the state availability schedules and exceptions.

Availability Schedules

Temporary schedule. Connecticut law provides that certain checks that are nonlocal under Regulation CC must be available in a shorter time (sixth business day after deposit for checks payable by depository institutions not located in Connecticut) than under the federal regulation (seventh business day after deposit under the temporary schedule for nonlocal checks). Accordingly, the Connecticut law supersedes Regulation CC with respect to nonlocal checks (other than checks covered by Appendix B-1) deposited in 'accounts' until the federal permanent availability schedules take effect on September 1, 1990.

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The Connecticut statute does not specify whether it applies to deposits of checks at nonproprietary ATMs. Under the temporary schedule in Regulation CC, deposits at nonproprietary ATMs must be made available for withdrawal at the start of the seventh business day after deposit. To the extent that the Connecticut schedules provide for shorter availability for deposits at nonproprietary ATMs, they would supersede the temporary schedule in Regulation CC for deposits at nonproprietary ATMs specified in Sec. 229.11(d).

Exceptions to the availability schedule. The Connecticut law provides exceptions for items received for deposit for the purpose of opening new accounts and for items that the depositary bank has reason to believe will not **clear.** In all cases where the federal availability schedule preempts the state schedule, only the federal exceptions will apply. For deposits that are covered by the state availability schedule (e.g., nonlocal out-of-state **checks** under the temporary schedule), the state exceptions may be used to extend the state availability schedule (of six business days) to meet the federal availability schedule (of seven business days). Once the deposit is held up to the federal availability schedule limit under a state exception, the depositary bank may further extend the hold under any federal exception that can be applied to the deposit. Any time a depositary bank invokes an exception to extend a hold beyond the time periods otherwise permitted by law, it must give notice of the extended hold to its customer, in accordance with Sec. 229.13(g) of Regulation CC.

Disclosures

The Connecticut statute (Conn. Gen. Stat. Section 36-9v(b)) requires written notice to depositors of an institution's check hold policy and requires a notice of the policy to be posted in each branch.

Regulation CC preempts state disclosure requirements concerning funds availability that relate to 'accounts' that are inconsistent with the federal requirements. The state requirements are different from, and therefore inconsistent with, the federal disclosure rules. (s 229.20(c)(2)). Thus, the Connecticut statute is preempted by Regulation CC to the extent that these disclosure provisions apply to 'accounts' as defined by Regulation CC. The Connecticut disclosure rules would continue to apply to accounts, such as savings and time accounts, not governed by the Regulation CC disclosure requirements.

Illinois

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act and Subpart B, and, in connection therewith, Subpart A, of Regulation CC, preempt provisions of Illinois law relating to the availability of funds.

Section 4-213(5) of the Uniform Commercial Code as adopted in Illinois (Illinois Revised Statutes Chapter 26, paragraph 4-213(5), enacted July 26, 1988) provides that:

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Time periods after which deposits must be available for withdrawal shall be determined by the provisions of the federal Expedited Funds Availability Act (Title VI of the Competitive Equality Banking Act of 1987) and the regulations promulgated by the Federal Reserve Board for the implementation of that Act.

Section 4-213(5) of the Illinois law does not supersede Regulation CC; and, because this provision of Illinois law does not permit funds to be made available for withdrawal in a longer period of time than required under the Act and Regulation, it is not preempted by Regulation CC.

Maine

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC, preempt the provisions of Maine law concerning the availability of funds. This preemption determination addresses the relation of the Act and Regulation CC to the Maine funds availability law. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

In 1985, Maine adopted a statute governing funds availability (Title 9-B MRSA section 241(5)), which requires Maine financial institutions to make funds deposited in a transaction account, savings account, or time account available for withdrawal within a reasonable period. The Maine statute gives the Superintendent of Banking for the State of Maine the authority to promulgate rules setting forth time limitations and disclosure requirements governing funds availability.

The Superintendent of Banking issued regulations implementing the Maine funds availability statute, effective July 1, 1987 (Regulation 18(IV)), and adopted amendments to this regulation, effective September 1, 1988. Under the revised regulation, funds deposited to any deposit account in a Maine financial institution must be made available for withdrawal in accordance with the Act and Regulation CC (Regulation 18-IV(A)(1)). The state regulation provides that an institution's funds availability policies for accounts subject to Regulation CC be disclosed in a manner consistent with the Regulation CC requirements. Funds availability policies for accounts not subject to Regulation CC must be disclosed in accordance with the state regulation (Regulation 18-IV(A)(2)).

Coverage

The Maine law and regulation govern the availability of funds to any deposit account, as defined in the Board's Regulation D (12 CFR 204.2(a)). This coverage is broader than the 'accounts' covered in Regulation CC. The Maine law continues to apply to all deposit accounts, including those that are not accounts under Regulation CC. (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC, in certain circumstances.)

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The Maine regulation incorporates the Regulation CC availability and disclosure requirements with respect to deposits to accounts covered by Regulation CC. Because the state requirements are consistent with the federal requirements, the Maine regulation is not preempted by, nor does it supersede, the federal law.

Massachusetts

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC, preempt provisions of Massachusetts law relating to the availability of funds. This preemption determination addresses the relationship of the Act and Regulation CC to the Massachusetts funds availability law. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

In 1988, Massachusetts amended its statute governing funds availability (Mass. Gen. L. ch. 167D, section 35), to require Massachusetts banking institutions to make funds available for withdrawal and disclose their availability policies in accordance with the Act and Regulation CC. The Massachusetts law, however, provides that 'local originating depository institution' is to be defined as any originating depository institution located in the Commonwealth.

Coverage

The Massachusetts statute governs the availability of funds deposited in 'any demand deposit, negotiable order of withdrawal account, savings deposit, share account or other asset account.' Regulation CC applies only to 'accounts' as defined in Sec. 229.2(a). Regulation CC does not affect the Massachusetts statute to the extent that the state law applies to deposits in savings and other accounts (including transaction accounts where the account holder is a bank, foreign bank, or the U.S. Treasury) that are not 'accounts' under Regulation CC. (Note, however, that under Sec. 229.19(e) of Regulation CC, Holds on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC, in certain circumstances.)

Availability Schedules

The Massachusetts definition of 'local originating depository institution' (local paying bank in Regulation CC terminology) requires that in-state checks that are nonlocal checks under Regulation CC be made available in accordance with the Regulation CC local schedule. The Massachusetts law supersedes Regulation CC under the temporary and permanent schedule with respect to nonlocal checks payable by banks located in Massachusetts and deposited into 'accounts.' Regulation CC preempts the Massachusetts law, however, to the

extent the state law does not define banks located outside of Massachusetts, but in the same check processing region as the paying bank, as 'local originating depository institutions.'

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Disclosures

The Massachusetts regulation incorporates the Regulation CC disclosure requirements with respect to both accounts covered by Regulation CC and savings and other accounts not governed by the federal regulation. Because the state requirements are consistent with the federal requirements, the Massachusetts regulation is not preempted by, nor does it supersede, the federal law. The Massachusetts disclosure rules would continue to apply to accounts not governed by the Regulation CC disclosure requirements.

New Jersey

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC preempt the provisions of New Jersey law concerning disclosure of a bank's funds availability policy. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

New Jersey does not have a law or regulation establishing the maximum time periods within which funds deposited by check or electronic payment must be made available for withdrawal. New Jersey does, however, have regulations concerning the disclosure of a banking institution's availability policy (N.J.A.C. 3:1-15.1 et seq.).

Disclosures

New Jersey law requires every banking institution (defined as any state or federally chartered commercial bank, savings bank, or savings and loan association) to provide written disclosure to all holders of and applicants for deposit accounts which describes the institution's funds availability policy. Institutions must also disclose to their customers any significant changes to their availability policy.

Regulation CC preempts state disclosure requirements concerning funds availability that relates to 'accounts' that are inconsistent with the federal requirements. The state requirements are different from, and therefore inconsistent with, the federal disclosure rules. (s 229.20(c)(2)). Thus, the New Jersey statute (N.J.A.C. sections 3:1-15.1 et seq.) is preempted by Regulation CC to the extent that these disclosure provisions apply to 'accounts' as defined by Regulation CC. The New Jersey disclosure rules would continue to apply to other 'deposit accounts,' as defined by New Jersey law, including money market accounts and savings accounts established by a natural person for personal or family purposes, which are not governed by the Regulation CC disclosure requirements.

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New York

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC, preempt the provisions of New York law concerning the availability of funds. This preemption determination addresses the relation of the Act and Regulation CC to the New York funds availability law. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

In 1983, the New York State Banking Department, pursuant to section 14-d of the New York Banking law, issued regulations requiring that funds deposited in an account be made available for withdrawal within specified time periods, and provided certain exceptions to those availability schedules. Part 34 of the New York State Banking Department's General Regulations established time frames within which commercial banks, trust companies, and branches of foreign banks ('banks'); and savings banks, savings and loan associations, and credit unions ('savings institutions') must make funds deposited in customer accounts available for withdrawal.

The Banking Department amended Part 34, effective September 1, 1988, generally to exclude accounts covered by Regulation CC from the scope of the state regulation. Part 34.4 (a)(2) and (b)(2) of the revised New York rules, however, continue to apply to checks deposited to accounts, as defined in Regulation CC. These provisions require that the proceeds of nonlocal checks payable by a New York institution be made available for withdrawal not later than the start of the fourth business day following deposit, if deposited in a bank, or the fifth business day following deposit, if deposited in a savings institution. The revised regulation also provides that, with respect to savings accounts and time deposits, New York institutions could elect to comply with either the state or federal availability and disclosure requirements.

This preemption determination supersedes the determination issued by the Board on August 18, 1988 (53 FR 32357 (August 24, 1988)).

Coverage

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The New York law and regulation govern the availability of funds in savings accounts and time deposits, as well as 'accounts' as defined in Sec. 229.2(a) of Regulation CC. The New York law continues to apply to deposits to savings accounts and time deposits that are not accounts under Regulation CC. (Note, however, that under Sec. 229.19(e) of Regulation CC, Hold on other funds, the federal availability schedules may apply to savings, time, and other accounts not defined as 'accounts' under Regulation CC, in certain circumstances.)

The New York law and regulation apply to 'items' deposited to accounts. Part 34.3(e) defines 'item' as 'a check, negotiable order of withdrawal or money order deposited into an account.' The Board interprets the definition of 'item'

in New York law to be consistent with the definition of 'check' in Regulation CC (s 229.2(k)).

Availability Schedules

The provisions of New York law governing the availability of in-state nonlocal items provide for shorter hold than is provided under Regulation CC, and supersede that federal availability requirements. With the exception of these provisions, the New York regulation does not apply to deposits to accounts covered by Regulation CC.

Temporary schedule. The time periods for the availability of in-state nonlocal checks, contained in Part 34.4 (a)(2) and (b)(2), are shorter that the seventh business day availability required for nonlocal checks under Sec. 229.11(c) of Regulation CC, although they are not necessarily shorter than the schedules for nonlocal checks set forth in Sec. 229.11(c)(2) and Appendix B-1 of Regulation CC. Thus, these state schedules supersede the federal schedule to the extent that they apply to an item payable by a New York bank or savings institution that is defined as a nonlocal checks under Regulation CC and the applicable state schedule is less than the applicable schedule specified in Sec. 229.11(c) and Appendix B-1.

Permanent schedule. The New York schedule for banks supersedes the Regulation CC requirement in the permanent schedule, effective September 1, 1990, that nonlocal checks be made available for withdrawal by the start of the fifth business day following deposit, to the extent that the in-state checks are defined as nonlocal under Regulation CC, and the Regulation CC schedule for nonlocal checks is not shortened under Sec. 229.12(c)(2) and Appendix B-2 of Regulation CC. In addition, the New York schedule for savings institutions supersedes the Regulation CC time period adjustment for withdrawal by cash or similar means in the permanent schedule, to the extent that the in-state checks are defined as nonlocal under Regulation CC, and the Regulation CC schedule for nonlocal checks is not shortened under Sec. 229.12(c)(2) and Appendix B-2.

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Exceptions to the availability schedules. New York law provides exceptions to the state availability schedules for large deposits, new accounts, repeated overdrafters, doubtful collectibility, foreign items, and emergency conditions (Part 34.4). The state exceptions apply only with respect to deposits of in-state nonlocal checks that are subject to the state availability schedule. For these deposits, the depositary bank may invoke a state exception and place a hold on the deposit up to the federal availability schedule limit for that type of deposit. Once the federal availability schedule limit is reached, the depositary bank may further extend the hold under any of the federal exceptions that apply to that deposit. Any time a depositary bank invokes an exception to extend a hold beyond the time periods otherwise permitted by law, it must give notice of the extended hold to its customer in accordance with Sec. 229.12(g) of Regulation CC.

Disclosures

The revised New York regulation does not contain funds availability disclosure requirements applicable to accounts subject to Regulation CC.

Rhode Island

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the 'Act') and Subpart B (and in connection therewith, Subpart A) of Regulation CC, supersede provisions of Rhode Island law relating to the availability of funds. This preemption determination specifies those provisions in the Rhode Island funds availability law that supersede the Act and Regulation CC. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

In 1986, Rhode Island adopted a statute governing funds availability (R.I. Gen. Laws tit. 6A, sections 4-601 through 4-608), which requires Rhode Island depository institutions to make checks deposited in a personal transaction account available for withdrawal within certain specific periods. Commercial banks and thrift institutions (mutual savings banks, savings banks, savings and loan institutions and credit unions) must make funds available for withdrawal in accordance with the following table:

	Commercial banks	Thrift institutions
Treasury checks, Rhode Island Government checks, first-in-dorsed	2nd	2nd
In-state cashier's checks less than $2,500	2nd	2nd
On-us checks	2nd	3rd
In-state **clearinghouse checks**	3rd	4th
In-state nonclearinghouse checks	5th	6th
1st or 2nd Federal Reserve District checks (out-of-state)	7th	7th
Other checks	9th	10th

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Note: These time periods are stated in terms of availability for withdrawal not later than the Xth business day following the banking day of deposit to facilitate comparison with Regulation CC. State regulations are stated in terms of availability at the start of the business day subsequent to the number of days specified in the regulation.

The Rhode Island statute also provides restrictions and exceptions to the schedules and requires institutions to make certain disclosures to their customers.

Coverage

The Rhode Island statute governing the availability of funds deposited in 'personal transaction accounts,' a term not defined in the statute. The federal law would continue to apply to 'accounts,' as defined in Sec. 229.2(a), that are not 'personal transaction accounts.'

The Rhode Island statute applies to 'items,' defined as checks, negotiable orders of withdrawal, or money orders. The Board interprets the definition of item to be consistent with the definition of 'check' in Regulation CC (s 299.2(k)).

Availability Schedules

Temporary schedule. Rhode Island law requires availability for certain **checks** in the same time as does Regulation CC. Thus, in these instances, the federal law does not preempt the state law. Rhode Island law requires commercial banks (but not thrift institutions) to make **checks** payable by a depositary institution that uses the same in-state **clearing** facility as the depositary bank available for withdrawal on the third business day following the day of the deposit. This is the same time period contained in Regulation CC for local **checks** payable by a bank that is a member of the same local **clearinghouse** as the depositary bank. (The Board views the definition of 'the same in-state **clearing** facility' as having the same meaning as the term 'the same **check clearinghouse** association' in the federal law's provision that allows banks to limit the customer's ability to withdraw cash on the third business day if the local **check** being deposited is payable by a bank that is not a member of the same local **clearinghouse** as the depositary bank.) Since the Rhode Island law and the federal law both require the funds to be made available no later than the third business day, the state law is not preempted by the federal law.

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The Rhode Island law also requires commercial banks and savings institutions to make checks payable by a depository institution located in the First or Second Federal Reserve District (outside of Rhode Island) available on the seventh business day following deposit. To the extent that this provision applies to checks payable by institutions located outside the Boston check processing region, it provides for availability in the same time as required for nonlocal checks under the temporary federal schedule, and thus is not preempted by the federal law.

The Rhode Island statute does not specify whether it applies to deposits of checks at nonproprietary ATMs. Under the temporary schedule in Regulation CC, deposits at nonproprietary ATMs must be made available for withdrawal at the opening of the seventh business day after deposit. To the extent that the Rhode Island schedules provide for shorter availability for deposits at nonproprietary ATMs, they would supersede the temporary schedule.

Exceptions to the availability schedules. The Rhode Island law contains exceptions for reason to doubt collectibility or ability of the depositor to reimburse the depositary bank, for new accounts, for large checks, and for foreign checks. In all cases where the federal availability schedule preempts the state schedule, only the federal exceptions will apply. For deposits that are covered by the state availability schedule, the state exceptions may be used to extend the state availability schedule to meet the federal availability schedule. Once the deposit is held up to the federal availability schedule limit under a state exception, the depositary bank may further extend the hold under any federal exception that can be applied to the deposit. Thus, if the state and federal availability schedules are the same for a particular deposit, both a state and a federal exception must be applicable to that deposit in order to extend the hold beyond the schedule. Any time a depositary bank invokes an exception to extend a hold beyond the time periods otherwise permitted by law, it must give notice of the extended hold to its customer, in accordance with Sec. 229.13(g) of Regulation CC.

Business day/banking day. The Rhode Island statute defines 'business day' as excluding Saturday, Sunday and legal holidays. This definition is preempted by the Regulation CC definitions of 'business day' and 'banking day'. Thus, for determining the permissible hold under the Rhode Island schedules that supersede the Regulation CC schedule, deposits are considered made on the specified number

of 'business days' following the 'banking day' of deposit.

Disclosures

The Rhode Island statute requires written notice to depositors of an institution's check hold policy and requires a notice on deposit slips. Regulation CC preempts state disclosure requirements concerning funds availability that relate to accounts that are inconsistent with the federal requirements. The state requirements are different from, and therefore inconsistent with, the federal rules. (s 229.20(c)(2)) Thus, Regulation CC preempts the Rhode Island disclosure requirements concerning funds availability.

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WISCONSIN

Background

The Board has been requested, in accordance with Sec. 229.20(d) of Regulation CC (12 CFR Part 229), to determine whether the Expedited Funds Availability Act (the Act) and Subpart B (and in connection therewith, Subpart A) of Regulation CC preempt the provisions of Wisconsin law concerning availability of funds. This preemption determination specifies those provisions of the Wisconsin funds availability law that are not preempted by the Act and Regulation CC. (See also the Board's preemption determination regarding the Uniform Commercial Code, section 4-213(5), pertaining to availability of cash deposits.)

Wisconsin Statutes sections 404.213(4m), 215.136, and 186.117 require Wisconsin banks, savings and loan associations, and credit unions, respectively, to make funds deposited in accounts available for withdrawal within specified time frames. Generally, checks drawn on the U.S. Treasury, the State of Wisconsin, or on a local government located in Wisconsin must be made available for withdrawal by the second day following deposit. (The law governing commercial banks determines availability based on banking day; the laws governing savings and loan associations and credit unions determine availability based on business days.) In-state and out-of-state checks must be made available for withdrawal within five days and eight days following deposit, respectively. Exceptions are provided for new accounts and reason to doubt collectibility. In addition, Wisconsin Statutes section 404.103 permits commercial banks to vary these availability requirements by agreement.

Coverage

Wisconsin law defines 'account', with respect to the rules governing commercial banks, as 'any account with a bank and includes a checking, time, interest or savings account' (Wisconsin Statutes section 404.104(1)(a)). The statutes relating to the funds availability requirements applicable to savings and loan associations and credit unions do not define the term 'account.' The Federal preemption of state funds availability requirements applies only to 'accounts' subject to Regulation CC, which generally consist of transaction accounts. Regulation CC does not affect the Wisconsin law to the extent that the state law applies to deposits in savings, time, and other accounts

if the depositary bank's **indorsement** does not appear on the **check** and it did not handle the **check.** The arrangement between the banks may constitute an agreement varying the effect of provisions of Subpart C under Sec. 229.37.

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XXII. Section 229.36 Presentment and Issuance of Checks

A. 229.36(a) Payable Through and Payable at Checks

1. For purposes of Subpart C, the regulation defines a payable-through or payable-at bank (which could be designated the collectible-through or collectible-at bank) as a paying bank. The requirements of Sec. 229.30(a) and the notice of nonpayment requirements of Sec. 229.33 are imposed on a payable-through or payable-at bank and are based on the time of receipt of the forward collection check by the payable-through or payable-at bank. This provision is intended to speed the return of checks that are payable through or at a bank to the depositary bank.

B. 229.36(b) Receipt at Bank Office or Processing Center

1. This paragraph seeks to facilitate efficient presentment of checks to promote early return or notice of nonpayment to the depositary bank and clarifies the law as to the effect of presentment by routing number. This paragraph differs from Sec. 229.32(a) because presentment of checks differs from delivery of returned checks.

2. The paragraph specifies four locations at which the paying bank must accept presentment of checks. Where the check is payable through a bank and the check is sent to that bank, the payable-through bank is the paying bank for purposes of this subpart, regardless of whether the paying bank must present the check to another bank or to a nonbank payor for payment.

a. Delivery of checks may be made, and presentment is considered to occur, at a location (including a processing center) requested by the paying bank. This is the way most checks are presented by banks today. This provision adopts the common law rule of a number of legal decisions that the processing center acts as the agent of the paying bank to accept presentment and to begin the time for processing of the check. (See also U.C.C. 4-204(c).) If a bank designates different locations for the presentment of forward collection checks bearing different routing numbers, for purposes of this paragraph it requests presentment of checks bearing a particular routing number only at the location designated for receipt of forward collection checks bearing that routing number.

b. i. Delivery may be made at an office of the bank associated with the routing number on the check. The office associated with the routing number of a bank is found in American Bankers Association Key to Routing Numbers, published by Thomson Financial Publishing Inc., which lists a city and state address for each routing number. Checks generally are handled by collecting banks on the basis of the nine-digit routing number encoded in magnetic ink (or on the basis of the fractional form routing number if the magnetic ink characters are obliterated) on the check, rather than the printed name or address. The definition of a paying bank in Sec. 229.2(z) includes a bank designated by routing number, whether or not there is a name on the check, and whether or not

any name is consistent with the routing number. Where a check is payable by one bank, but payable through another, the routing number is that of the payable-through bank, not that of the payor bank. As the payor bank has selected the payable-through bank as the point through which presentment is to be made, it is proper to treat the payable-through bank as the paying bank for purposes of this section.

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ii. There is no requirement in the regulation that the name and address on the check agree with the address associated with the routing number on the check. A bank generally may control the use of its routing number, just as it does the use of its name. The address associated with the routing number may be a processing center.

iii. In some cases, a paying bank may have several offices in the city associated with the routing number. In such case, it would not be reasonable or efficient to require the presenting bank to sort the checks by more specific branch addresses that might be printed on the checks, and to deliver the checks to each branch. A collecting bank normally would deliver all checks to one location. In cases where checks are delivered to a branch other than the branch on which they may be drawn, computer and courier communication among branches should permit the paying bank to determine quickly whether to pay the check.

c. If the check specifies the name of the paying bank but no address, the bank must accept delivery at any office. Where delivery is made by a person other than a bank, or where the routing number is not readable, delivery will be made based on the name and address of the paying bank on the check. If there is no address, delivery may be made at any office of the paying bank. This provision is consistent with U.C.C. 3-111, which states that presentment for payment may be made at the place specified in the instrument, or, if there is none, at the place of business of the party to pay. Thus, there is a trade-off for a paying bank between specifying a particular address on a check to limit locations of delivery, and simply stating the name of the bank to encourage wider currency for the check.

d. If the check specifies the name and address of a branch or head office, or other location (such as a processing center), the check may be delivered by delivery to that office or other location. If the address is too general to identify a particular office, delivery may be made at any office consistent with the address. For example, if the address is 'San Francisco, California,' each office in San Francisco must accept presentment. The designation of an address on the check generally is in the control of the paying bank.

3. This paragraph may affect U.C.C. 3-111 to the extent that the U.C.C. requires presentment to occur at a place specified in the instrument.

C. 229.36(c) Truncation

1. Truncation includes a variety of procedures in which the physical check is held or delayed by the depositary or collecting bank, and the information from the check is transmitted to the paying bank electronically. Presentment takes place when the paying bank receives the electronic transmission. This process has the potential to improve the efficiency of check processing, and express provision for truncation and electronic presentment is made in U.C.C. 4-110 and 4-406(b). This paragraph allows truncation by agreement with the paying bank; however, such agreement may not prejudice the interests of prior parties to the check. For example, a truncation agreement may not extend the paying bank's time for return. Such an extension could damage the depositary bank, which must make funds available to its customers under mandatory availability schedules.

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D. 229.36(d) Liability of Bank During Forward Collection

1. This paragraph makes settlement between banks during forward collection final when made, subject to any deferment of credit, just as settlements between banks during the return of **checks** are final. In addition, this paragraph clarifies that this change does not affect the liability scheme under U.C.C. 4-201 during forward collection of a **check.** That U.C.C. section provides that, unless a contrary intent **clearly** appears, a bank is an agent or subagent of the owner of a **check,** but that Article 4 of the U.C.C. applies even though a bank may have purchased an item and is the owner of it. This paragraph preserves the liability of a collecting bank to prior collecting banks and the depositary bank's customer for negligence during the forward collection of a **check** under the U.C.C., even though this paragraph provides that settlement between banks during forward collection is final rather than provisional. Settlement by a paying bank is not considered to be final payment for the purposes of U.C.C. 4-215(a)(2) or (3), because a paying bank has the right to recover settlement from a returning or depositary bank to which it returns a **check** under this subpart. Other provisions of the U.C.C. not superseded by this subpart, such as section 4-202, also continue to apply to the forward collection of a **check** and may apply to the return of a **check.** (See definition of returning bank in Sec. 229.2(cc).)

E. 229.36(e) Issuance of Payable Through Checks

1. If a bank arranges for checks payable by it to be payable through another bank, it must require its customers to use checks that contain conspicuously on their face the name, location, and first four digits of the nine-digit routing number of the bank by which the check is payable and the legend 'payable through' followed by the name and location of the payable-through bank. The first four digits of the nine-digit routing number and the location of the bank by which the check is payable must be associated with the same check processing region. (This section does not affect Sec. 229.36(b).) The required information is deemed conspicuous if it is printed in a type size not smaller than six-point type and if it is contained in the title plate, which is located in the lower left quadrant of the check. The required information may be conspicuous if it is located elsewhere on the check.

2. If a payable-through check does not meet the requirements of this paragraph, the bank by which the check is payable may be liable to the depositary bank or others as provided in Sec. 229.38. For example, a bank by which a payable-through check is payable could be liable to a depositary bank that suffers a loss, such as lost interest or liability under Subpart B, that would not have occurred had the check met the requirements of this paragraph. Similarly, a bank may be liable under Sec. 229.38 if a check payable by it that is not payable through another bank is labeled as provided in this section. For example, a bank that holds checking accounts and processes checks at a central location but has widely-dispersed branches may be liable under this section if it labels all of its checks as 'payable through' a single branch and includes the name, address, and four-digit routing symbol of another branch. These checks would not be payable through another bank and should not be labeled as payable-through checks. (All of a bank's offices within the United States are

considered part of the same bank; see Sec. 229.2(e).) In this example, the bank by which the checks are payable could be liable to a depositary bank that suffers a loss, such as lost interest or liability under Subpart B, due to the mislabeled check. The bank by which the check is payable may be liable for additional damages if it fails to act in good faith.

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F. 229.36(f) Same-Day Settlement

1. This paragraph provides that, under certain conditions, a paying bank must settle with a presenting bank for a check on the same day the check is presented in order to avail itself of the ability to return the check on its next banking day under U.C.C. 4-301 and 4-302. This paragraph does not apply to checks presented for immediate payment over the counter. Settling for a check under this paragraph does not constitute final payment of the check under the U.C.C. This paragraph does not supersede or limit the rules governing collection and return of checks through Federal Reserve Banks that are contained in Subpart A of Regulation J (12 CFR part 210).

2. Presentment requirements.

a. Location and time.

i. For presented checks to qualify for mandatory same-day settlement, information accompanying the checks must indicate that presentment is being made under this paragraph--e.g. 'these checks are being presented for same-day settlement'--and must include a demand for payment of the total amount of the checks together with appropriate payment instructions in order to enable the paying bank to discharge its settlement responsibilities under this paragraph. In addition, the check or checks must be presented at a location designated by the paying bank for receipt of checks for same-day settlement by 8:00 a.m. local time of that location. The designated presentment location must be a location at which the paying bank would be considered to have received a check under Sec. 229.36(b). The paying bank may not designate a location solely for presentment of checks subject to settlement under this paragraph; by designating a location for the purposes of Sec. 229.36(f), the paying bank agrees to accept checks at that location for the purposes of Sec. 229.36(b).

ii. The designated presentment location also must be within the check processing region consistent with the nine-digit routing number encoded in magnetic ink on the check. A paying bank that uses more than one routing number associated with a single check processing region may designate, for purposes of this paragraph, one or more locations in that check processing region at which checks will be accepted, but the paying bank must accept any checks with a routing number associated with that check processing region at each designated location. A paying bank may designate a presentment location for traveler's checks with an 8000-series routing number anywhere in the country because these traveler's checks are not associated with any check processing region. The paying bank, however, must accept at that presentment location any other checks for which it is paying bank that have a routing number consistent with the check processing region of that location.

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iii. If the paying bank does not designate a presentment location, it must accept presentment for same-day settlement at any location identified in Sec. 229.36(b), i.e., at an address of the bank associated with the routing number on

the check, at any branch or head office if the bank is identified on the check by name without address, or at a branch, head office, or other location consistent with the name and address of the bank on the check if the bank is identified on the check by name and address. A paying bank and a presenting bank may agree that checks will be accepted for same-day settlement at an alternative location (e.g., at an intercept processor located in a different check processing region) or that the cut-off time for same-day settlement be earlier or later than 8:00 a.m. local time.

iv. In the case of a check payable through a bank but payable by another bank, this paragraph does not authorize direct presentment to the bank by which the check is payable. The requirements of same-day settlement under this paragraph would apply to a payable-through or payable-at bank to which the check is sent for payment or collection.

b. Reasonable delivery requirements. A check is considered presented when it is delivered to and payment is demanded at a location specified in paragraph (f)(1). Ordinarily, a presenting bank will find it necessary to contact the paying bank to determine the appropriate presentment location and any delivery instructions. Further, because presentment might not take place during the paying bank's banking day, a paying bank may establish reasonable delivery requirements to safeguard the checks presented, such as use of a night depository. If a presenting bank fails to follow reasonable delivery requirements established by the paying bank, it runs the risk that it will not have presented the checks. However, if no reasonable delivery requirements are established or if the paying bank does not make provisions for accepting delivery of checks during its non-business hours, leaving the checks at the presentment location constitutes effective presentment.

c. Sorting of checks. A paying bank may require that checks presented to it for same-day settlement be sorted separately from other forward collection checks it receives as a collecting bank or returned checks it receives as a returning or depositary bank. For example, if a bank provides correspondent check collection services and receives unsorted checks from a respondent bank that include checks for which it is the paying bank and that would otherwise meet the requirements for same-day settlement under this section, the collecting bank need not make settlement in accordance with paragraph (f)(2). If the collecting bank receives sorted checks from its respondent bank, consisting only of checks for which the collecting bank is the paying bank and that meet the requirements for same-day settlement under this paragraph, the collecting bank may not charge a fee for handling those checks and must make settlement in accordance with this paragraph.

3. Settlement

a. If a bank presents a check in accordance with the time and location requirements for presentment under paragraph (f)(1), the paying bank either must settle for the check on the business day it receives the check without charging a presentment fee or return the check prior to the time for settlement. (This return deadline is subject to extension under Sec. 229.30(c).) The settlement must be in the form of a credit to an account designated by the presenting bank at a Federal Reserve Bank (e.g., a Fedwire transfer). The presenting bank may agree with the paying bank to accept settlement in another form (e.g., credit to an account of the presenting bank at the paying bank or debit to an account of the paying bank at the presenting bank). The settlement must occur by the close of Fedwire on the business day the check is received by the paying bank. Under the provisions of Sec. 229.34(c), a settlement owed to a presenting bank may be set off by adjustments for previous settlements with the presenting bank. (See also Sec. 229.39(d).)

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b. Checks that are presented after the 8 a.m. (local time) presentment deadline for same-day settlement and before the paying bank's cut-off hour are treated as if they were presented under other applicable law and settled for or returned accordingly. However, for purposes of settlement only, the presenting bank may require the paying bank to treat such checks as presented for same-day settlement on the next business day in lieu of accepting settlement by cash or other means on the business day the checks are presented to the paying bank. Checks presented after the paying bank's cut-off hour or on non-business days, but otherwise in accordance with this paragraph, are considered presented for same-day settlement on the next business day.

4. Closed Paying Bank

a. There may be certain business days that are not banking days for the paying bank. Some paying banks may continue to settle for checks presented on these days (e.g., by opening their back office operations or by using an intercept processor). In other cases, a paying bank may be unable to settle for checks presented on a day it is closed.

If the paying bank closes on a business day and checks are presented to the paying bank in accordance with paragraph (f)(1), the paying bank is accountable for the checks unless it settles for or returns the checks by the close of Fedwire on its next banking day. In addition, checks presented on a business day on which the paying bank is closed are considered received on the paying bank's next banking day for purposes of the U.C.C. midnight deadline (U.C.C. 4-301 and 4-302) and this regulation's expeditious return and notice of nonpayment provisions.

b. If the paying bank is closed on a business day voluntarily, the paying bank must pay interest compensation, as defined in Sec. 229.2(oo), to the presenting bank for the value of the float associated with the check from the day of the voluntary closing until the day of settlement. Interest compensation is not required in the case of an involuntary closing on a business day, such as a closing required by state law. In addition, if the paying bank is closed on a business day due to emergency conditions, settlement delays and interest compensation may be excused under Sec. 229.38(e) or U.C.C. 4-109(b).

5. Good faith. Under Sec. 229.38(a), both presenting banks and paying banks are held to a standard of good faith, defined in Sec. 229.2(nn) to mean honesty in fact and the observance of reasonable commercial standards of fair dealing. For example, designating a presentment location or changing presentment locations for the primary purpose of discouraging banks from presenting checks for same-day settlement might not be considered good faith on the part of the paying bank. Similarly, presenting a large volume of checks without prior notice could be viewed as not meeting reasonable commercial standards of fair dealing and therefore may not constitute presentment in good faith. In addition, if banks, in the general course of business, regularly agree to certain practices related to same-day settlement, it might not be considered consistent with reasonable commercial standards of fair dealing, and therefore might not be considered good faith, for a bank to refuse to agree to those practices if agreeing would not cause it harm.

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6. U.C.C. sections affected. This paragraph directly affects the following provisions of the U.C.C. and may affect other sections or provisions:

a. Section 4-204(b)(1), in that a presenting bank may not send a check for same-day settlement directly to the paying bank, if the paying bank designates a different location in accordance with paragraph (f)(1).

b. Section 4-213(a), in that the medium of settlement for checks presented

under this paragraph is limited to a credit to an account at a Federal Reserve Bank and that, for checks presented after the deadline for same-day settlement and before the paying bank's cut-off hour, the presenting bank may require settlement on the next business day in accordance with this paragraph rather than accept settlement on the business day of presentment by cash.

c. Section 4-301(a), in that, to preserve the ability to exercise deferred posting, the time limit specified in that section for settlement or return by a paying bank on the banking day a check is received is superseded by the requirement to settle for checks presented under this paragraph by the close of Fedwire.

d. Section 4-302(a), in that, to avoid accountability, the time limit specified in that section for settlement or return by a paying bank on the banking day a check is received is superseded by the requirement to settle for checks presented under this paragraph by the close of Fedwire.

XXIII. Section 229.37 Variations by Agreement

A. This section is similar to U.C.C. 4-103, and permits consistent treatment of agreements varying Article 4 or Subpart C, given the substantial interrelationship of the two documents. To achieve consistency, the official comment to U.C.C. 4-103(a) (which in turn follows [illegible]01(3)) should be followed in construing this section. For example, [illegible] Official Comment 2 to section 4-103, owners of items and other [illegible] are not affected by agreements under this section unless they are parties to the agreement or are bound by adoption, ratification, or the like. In particular, agreements varying this subpart [illegible] return of a check beyond the times required by this subpart [illegible] bility under Sec. 229.38 to entities not party to the agreement [illegible] on is consistent with the limits on truncation agreements in Sec. [illegible]

B. The Board has not followed U.C.C. 4-103(b) [illegible] permits Federal Reserve regulations and operating letters, clearinghouse [illegible], and the like to apply to parties that have not specifically assented. Nevertheless, this section does not affect the status of such agreements under the U.C.C.

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C. The following are examples of situations where variation by agreement is permissible, subject to the limitations of this section:

1. A depositary bank may authorize another bank to apply the other bank's **indorsement** to a **check** as the depositary bank. (See Sec. 229.35(d).)

2. A depositary bank may authorize returning banks to commingle qualified returned checks with forward collection checks. (See Sec. 229.32(a).)

3. A depositary bank may limit its liability to its customer in connection with the late return of a deposited **check** where the lateness is caused by markings on the **check** by the depositary bank's customer or prior **indorser** in the area of the depositary bank **indorsement.** (See Sec. 229.38(d).)

4. A paying bank may require its customer to assume the paying bank's liability for delayed or missent **checks** where the delay or missending is caused by markings placed on the **check** by the paying bank's customer that obscured a properly placed **indorsement** of the depositary bank. (See Sec. 229.38(d).)

5. A collecting or paying bank may agree to accept forward collection **checks** without the **indorsement** of a prior collecting bank. (See Sec. 229.35(a).)

6. A bank may agree to accept returned **checks** without the **indorsement** of a prior bank. (See Sec. 229.35(a).)

7. A presenting bank may agree with a paying bank to present checks for same-day settlement at a location that is not in the check processing region

not recover the settlement made to the presenting bank. Thus, this paragraph requires the returning bank to settle for a returned check (either with the paying bank or another returning bank) in the same way that it would settle for a similar check for forward collection. To achieve uniformity, this paragraph applies even if the returning bank handled the check for forward collection.

2. Any returning bank, including one that handled the check for forward collection, may provide availability for returned checks pursuant to an availability schedule as it does for forward collection checks. These settlements by returning banks, as well as settlements between banks made during the forward collection of a check, are considered final when made subject to any deferment of availability. (See Sec. 229.36(d) and Commentary to Sec. 229.35(b).)

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3. A returning bank may vary the settlement method it uses by agreement with paying banks or other returning banks. Special rules apply in the case of insolvency of banks. (See Sec. 229.39.) If payment cannot be obtained from a depositary or returning bank because of its insolvency or otherwise, recovery can be had by returning, paying, and collecting banks from prior banks on this basis of the liability of prior banks under Sec. 229.35(b).

4. This paragraph affects U.C.C. 4-214(a) in that a paying or collecting bank does not ordinarily have a right to charge back against the bank from which it received the returned check, although it is entitled to settlement if it returns the returned check to that bank, and may affect other sections or provisions. Under Sec. 229.36(d), a bank collecting a check remains liable to prior collecting banks and the depositary bank's customer under the U.C.C.

D. 229.31(d) Charges

1. This paragraph permits any returning bank, even one that handled the check for forward collection, to impose a fee on the paying bank or other returning bank for its service in handling a returned check. Where a claim is made under Sec. 229.35(b), the bank on which the claim is made is not authorized by this paragraph to impose a charge for taking up a check. This paragraph preempts state laws to the extent that these laws prevent returning banks from charging fees for handling returned checks.

E. 229.31(e) Depositary Bank Without Accounts

1. This paragraph is similar to Sec. 229.30(e) and relieves a returning bank of its obligation to make expeditious return to a depositary bank that does not maintain any accounts. (See the Commentary to Sec. 229.30(e).)

F. 229.31(f) Notice in Lieu of Return

1. This paragraph is similar to Sec. 229.30(f) and authorizes a returning bank to originate a notice in lieu of return if the returned check is unavailable for return. Notice in lieu of return is permitted only when a bank does not have and cannot obtain possession of the check or must retain possession of the check for protest. A check is not unavailable for return if it is merely difficult to retrieve from a filing system or from storage by a keeper of checks in a truncation system. (See the Commentary to Sec. 229.30(f).)

G. 229.31(g) Reliance on Routing Number

1. This paragraph is similar to Sec. 229.30(g) and permits a returning bank to rely on routing numbers appearing on a returned **check** such as routing numbers in the depositary bank's **indorsement** or on qualified returned **checks.** (See the Commentary to Sec. 229.30(g).)

XVIII. Section 229.32 Depositary Bank's Responsibility for Returned Checks

A. 229.32(a) Acceptance of Returned Checks

1. This regulation seeks to encourage direct returns by paying and returning banks and may result in a number of banks sending **checks** to depositary banks with no preexisting arrangements as to where the returned **checks** should be delivered. This paragraph states where the depositary bank is required to accept returned **checks** and written notices of nonpayment under Sec. 229.33. (These locations differ from locations at which a depositary bank must accept electronic notices.) It is derived from U.C.C. 3-111, which specifies that presentment for payment may be made at the place specified in the instrument or, if there is none, at the place of business of the party to pay. In the case of returned **checks,** the depositary bank does not print the **check** and can only specify the place of 'payment' of the returned **check** in its **indorsement.**

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2. The paragraph specifies four locations at which the depositary bank must accept returned checks:

a. The depositary bank must accept returned checks at any location at which it requests presentment of forward collection checks such as a processing center. A depositary bank does not request presentment of forward collection checks at a branch of the bank merely by paying checks presented over the counter.

b. i. If the depositary bank **indorsement** states the name and address of the depositary bank, it must accept returned **checks** at the branch, head office, or other location, such as a processing center, indicated by the address. If the address is too general to identify a particular location, then the depositary bank must accept returned **checks** at any branch or head office consistent with the address. If, for example, the address is 'New York, New York,' each branch in New York City must accept returned **checks.**

ii. If no address appears in the depositary bank's **indorsement,** the depositary bank must accept returned **checks** at any branch or head office associated with the depositary bank's routing number. The offices associated with the routing number of a bank are found in American Bankers Association Key to Routing Numbers, published by Thomson Financial Publishing Inc., which lists a city and state address for each routing number.

iii. The depositary bank must accept returned **checks** at the address in its **indorsement** and at an address associated with its routing number in the **indorsement** if the written address in the **indorsement** and the address associated with the routing number in the **indorsement** are not in the same **check** processing region. Under ss 229.30(g) and 229.31(g), a paying or returning bank may rely on the depositary bank's routing number in its **indorsement** in handling returned **checks** and is not required to send returned **checks** to an address in the depositary bank's **indorsement** that is not in the same **check** processing region as the address associated with the routing number in the **indorsement.**

iv. If no routing number or address appears in its **indorsement,** the depositary bank must accept a returned **check** at any branch or head office of the

bank. The **indorsement** requirement of Sec. 229.35 and Appendix D requires that the **indorsement** contain a routing number, a name, and a location. Consequently, this provision, as well as paragraph (a)(2)(ii) of this section, only applies where the depositary bank has failed to comply with the **indorsement** requirement.

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3. For ease of processing, a depositary bank may require that returning or paying banks returning checks to it separate returned checks from forward collection checks being presented.

4. Under Sec. 229.33(d), a depositary bank receiving a returned check or notice of nonpayment must send notice to its customer by its midnight deadline or within a longer reasonable time.

B. 229.32(b) Payment

1. As discussed in the commentary to Sec. 229.31(c), under this regulation a paying or returning bank does not obtain credit for a returned check by charge-back but by, in effect, presenting the returned check to the depositary bank. This paragraph imposes an obligation to 'pay' a returned check that is similar to the obligation to pay a forward collection check by a paying bank, except that the depositary bank may not return a returned check for which it is the depositary bank. Also, certain means of payment, such as remittance drafts, may be used only with the agreement of the returning bank.

2. The depositary bank must pay for a returned check by the close of the banking day on which it received the returned check. The day on which a returned check is received is determined pursuant to U.C.C. 4-108, which permits the bank to establish a cut-off hour, generally not earlier than 2:00 p.m., and treat checks received after that hour as being received on the next banking day. If the depositary bank is unable to make payment to a returning or paying bank on the banking day that it receives the returned check, because the returning or paying bank is closed for a holiday or because the time when the depositary bank received the check is after the close of Fedwire, e.g., west coast banks with late cut-off hours, payment may be made on the next banking day of the bank receiving payment.

3. Payment must be made so that the funds are available for use by the bank returning the check to the depositary bank on the day the check is received by the depositary bank. For example, a depositary bank meets this requirement if it sends a wire transfer of funds to the returning or paying bank on the day it receives the returned check, even if the returning or paying bank has closed for the day. A wire transfer should indicate the purpose of the payment.

4. The depositary bank may use a net settlement arrangement to settle for a returned check. Banks with net settlement agreements could net the appropriate credits and debits for returned checks with the accounting entries for forward collection checks if they so desired. If, for purposes of establishing additional controls or for other reasons, the banks involved desired a separate settlement for returned checks, a separate net settlement agreement could be established.

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5. The bank sending the returned check to the depositary bank may agree to accept payment at a later date if, for example, it does not believe that the amount of the returned check or checks warrants the costs of same-day payment. Thus, a returning or paying bank may agree to accept payment through an ACH credit or debit transfer that settles the day after the returned check is received instead of a wire transfer that settles on the same day.

6. This paragraph and this subpart do not affect the depositary bank's right to recover a provisional settlement with its nonbank customer for a check that is returned. (See also ss 229.19(c)(2)(ii), 229.33(d) and 229.35(b).)

C. 229.32(c) Misrouted Returned Checks

1. This paragraph permits a bank receiving a check on the basis that it is the depositary bank to send the misrouted returned check to the correct depositary bank, if it can identify the correct depositary bank, either directly or through a returning bank agreeing to handle the check expeditiously under Sec. 229.30(a). In these cases, the bank receiving the check is acting as a returning bank. Alternatively, the bank receiving the misrouted returned check must send the check back to the bank from which it was received. In either case the bank to which the returned check was misrouted could receive settlement for the check. The depositary bank would be required to pay for the returned check under Sec. 229.32(b), and any other bank to which the check is sent under this paragraph would be required to settle for the check as a returning bank under Sec. 229.31(c). If the check was originally received 'free,' that is, without a charge for the check, the bank incorrectly receiving the check would have to return the check, without a charge, to the bank from which it came. The bank to which the returned check was misrouted is required to act promptly but is not required to meet the expeditious return requirements of Sec. 229.31(a); however, it must act within its midnight deadline. This paragraph does not affect a bank's duties under Sec. 229.35(b).

D. 229.32(d) Charges

1. This paragraph prohibits a depositary bank from charging the equivalent of a presentment fee for returned checks. A returning bank, however, may charge a fee for handling returned checks. If the returning bank receives a mixed cash letter of returned checks, which includes some checks for which the returning bank also is the depositary bank, the fee may be applied to all the returned checks in the cash letter. In the case of a sorted cash letter containing only returned checks for which the returning bank is the depositary bank, however, no fee may be charged.

XIX. Section 229.33 Notice of Nonpayment

A. 229.33(a) Requirement

1. Notice of nonpayment as required by this section and written notice in lieu of return as provided in ss 229.30(f) and 229.31(f) serve different functions. The two kinds of notice, however, must meet the content requirements of this section. The paying bank must send a notice of nonpayment if it decides not to pay a check of $2,500 or more. A paying bank may rely on an amount encoded on the check in magnetic ink to determine whether the check is in the amount of $2,500 or more. The notice of nonpayment carries no value, and the check itself (or the notice in lieu of return) must be returned. The paying bank must ensure that the notice of nonpayment is received by the depositary bank by 4:00 p.m. local time on the second business day following presentment. A bank identified by routing number as the paying bank is considered the paying bank under this regulation and would be required to create a notice of nonpayment even though that bank determined that the check was not drawn by a customer of that bank. (See Commentary to the definition of paying bank in Sec. 229.2(z).)

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2. The paying bank should not send a notice of nonpayment until it has finally determined not to pay the check. Under Sec. 229.34(b), by sending the notice the paying bank warrants that it has returned or will return the check. If a paying bank sends a notice and subsequently decides to pay the check, the paying bank may mitigate its liability on this warranty by notifying the depositary bank that the check has been paid.

3. Because the return of the **check** itself may serve as the required notice of nonpayment, in many cases no notice other than the return of the **check** will be necessary. For example, in many cases the return of a **check** through a **clearinghouse** to another participant of the **clearinghouse** will be made in time to meet the time requirements of this section. If the **check** normally will not be received by the depositary bank within the time limits for notice, the return of the **check** will not satisfy the notice requirement. In determining whether the returned **check** will satisfy the notice requirement, the paying bank may rely on the availability schedules of returning banks as the time that the returned **check** is expected to be delivered to the depositary bank, unless the paying bank has reason to know the availability schedules are inaccurate.

4. Unless the returned check is used to satisfy the notice requirement, the requirement for notice is independent of and does not affect the requirements for timely and expeditious return of the check under Sec. 229.30 and the U.C.C. (See Sec. 229.30(a).) If a paying bank fails both to comply with this section and to comply with the requirements for timely and expeditious return under Sec. 229.30 and the U.C.C. and Regulation J (12 CFR part 210), the paying bank shall be liable under either this section or such other requirements, but not both. (See Sec. 229.38(b).) A paying bank is not responsible for failure to give notice of nonpayment to a party that has breached a presentment warranty under U.C.C. 4-208, notwithstanding that the paying bank may have returned the check. (See U.C.C. 4-208 and that the paying bank may have returned the check. (See U.C.C. 4-208 and 4-302.)

B. 229.33(b) Content of Notices

1. This paragraph provides that the notice must at a minimum contain eight elements which are specifically enumerated. In the case of written notices, the name and routing number of the depositary bank also are required.

2. If the paying bank cannot identify the depositary bank from the check itself, it may wish to send the notice to the earliest collecting bank it can identify and indicate that the notice is not being sent to the depositary bank. The collecting bank may be able to identify the depositary bank and forward the notice, but is under no duty to do so. In addition, the collecting bank may actually be the depositary bank.

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C. 229.33(c) Acceptance of Notice

1. In the case of a written notice, the depositary bank is required to accept notices at the locations specified in Sec. 229.32(a). In the case of telephone notices, the bank may not refuse to accept notices at the telephone numbers identified in this section, but may transfer calls or use a recording device. Banks may vary by agreement the location and manner in which notices are

received.

D. 229.33(d) Notification to Customer

1. This paragraph requires a depositary bank to notify its customer of nonpayment upon receipt of a returned check or notice of nonpayment, regardless of the amount of the check or notice. This requirement is similar to the requirement under the U.C.C. as interpreted in Appliance Buyers Credit Corp. v. Prospect National Bank, 708 F.2d 290 (7th Cir. 1983), that a depositary bank may be liable for damages incurred by its customer for its failure to give its customer timely advice that it has received a notice of nonpayment. Notice also must be given if a depositary bank receives a notice of recovery under Sec. 229.35(b). The notice to the customer required under this paragraph also may satisfy the notice requirement of Sec. 229.13(g) if the depositary bank invokes the reasonable cause exception of Sec. 229.13(e) due to the receipt of a notice of nonpayment, provided the notice meets the other requirements of Sec. 229.13(g).

XX. Section 229.34 Warranties

A. 229.34(a) Warranty of Returned Check

1. This paragraph includes warranties that a returned check, including a notice in lieu of return, was returned by the paying bank, or in the case of a check payable by a bank and payable through another bank, the bank by which the check is payable, within the deadline under the U.C.C., Regulation J, or Sec. 229.30(c); that the paying or returning bank is authorized to return the check; that the returned check has not been materially altered; and that, in the case of a notice in lieu of return, the original check has not been and will not be returned for payment. (See the Commentary to Sec. 229.30(f).) The warranty does not include a warranty that the bank complied with the expeditious return requirements of ss 229.30(a) and 229.31(a). These warranties do not apply to checks drawn on the United States Treasury, to U.S. Postal Service money orders, or to checks drawn on a state or a unit of general local government that are not payable through or at a bank. (See Sec. 229.42.)

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B. 229.34(b) Warranty of Notice of Nonpayment

1. This paragraph provides for warranties for notices of nonpayment. This warranty does not include a warranty that the notice is accurate and timely under Sec. 229.33. The requirements of Sec. 229.33 that are not covered by the warranty are subject to the liability provisions of Sec. 229.38. These warranties are designed to give the depositary bank more confidence in relying on notices of nonpayment. This paragraph imposes liability on a paying bank that gives notice of nonpayment and then subsequently returns the check. (See Commentary on Sec. 229.33(a).)

C. 229.34(c) Warranty of Settlement Amount, Encoding, and Offset

1. Paragraph (c)(1) provides that a bank that presents and receives settlement for checks warrants to the paying bank that the settlement it demands

(e.g., as noted on the cash letter) equals the total amount of the checks it presents. This paragraph gives the paying bank a warranty claim against the presenting bank for the amount of any excess settlement made on the basis of the amount demanded, plus expenses. If the amount demanded is understated, a paying bank discharges its settlement obligation under U.C.C. 4-301 by paying the amount demanded, but remains liable for the amount by which the demand is understated; the presenting bank is nevertheless liable for expenses in resolving the adjustment.

2. When checks or returned checks are transferred to a collecting, returning, or depositary bank, the transferor bank is not required to demand settlement, as is required upon presentment to the paying bank. However, often the checks or returned checks will be accompanied by information (such as a cash letter listing) that will indicate the total of the checks or returned checks. Paragraph (c)(2) provides that if the transferor bank includes information indicating the total amount of checks or returned checks transferred, it warrants that the information is correct (i.e., equals the actual total of the items).

3. Paragraph (c)(3) provides that a bank that presents or transfers a check or returned check warrants the accuracy of the magnetic ink encoding that was placed on the item after issue, and that exists at the time of presentment or transfer, to any bank that subsequently handles the check or returned check. Under U.C.C. 4-209(a), only the encoder (or the encoder and the depositary bank, if the encoder is a customer of the depositary bank) warrants the encoding accuracy, thus any claims on the warranty must be directed to the encoder. Paragraph (c)(3) expands on the U.C.C. by providing that all banks that transfer or present a check or returned check make the encoding warranty. In addition, under the U.C.C., the encoder makes the warranty to subsequent collecting banks and the paying bank, while paragraph (c)(3) provides that the warranty is made to banks in the return chain as well.

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4. A paying bank that settles for an overstated cash letter because of a misencoded check may make a warranty claim against the presenting bank under paragraph (c)(1) (which would require the paying bank to show that the check was part of the overstated cash letter) or an encoding warranty claim under paragraph (c)(3) against the presenting bank or any preceding bank that handled the misencoded check.

5. Paragraph (c)(4) provides that the paying bank may set off any excess settlement made against settlement owed to the presenting bank for checks presented subsequently.

D. 229.34(d) Damages

1. This paragraph adopts for the warranties in Sec. 229.34 (a), (b), and (c) the damages provided in U.C.C. 4-207(c) and 4A-506(b). (See definition of interest compensation in Sec. 229.2(oo).)

E. 229.34(e) Tender of Defense

1. This paragraph adopts for this regulation the vouching-in provisions of U.C.C. 3-119.

XXI. Section 229.35 Indorsements

A. 229.35(a) Indorsement Standards

1. This section and Appendix D require banks to use a standard form of **indorsement** when **indorsing checks** during the forward collection and return process. The standard provides for **indorsements** by all collecting and returning banks, plus a unique standard for depositary bank **indorsements.** It is designed to facilitate the identification of the depositary bank and the prompt return of **checks.** The regulation places a duty on banks to ensure that their **indorsements** are legible. The **indorsement** standard specifies the information each **indorsement** must contain and its location and ink color.

2. The **indorsement** standard requires that the nine-digit routing number of the depositary bank be wholly contained in an area on the back of the **check** from 3.0 inches from the leading edge to 1.5 inches from the trailing edge of the **check.** This permits banks to use encoding equipment that measures from either the leading or trailing edge of the **check** to place **indorsements** in this area. The standard does not require that the entire depositary bank **indorsement** be contained within the specified area, but **checks** will be handled most efficiently if depositary banks place as much information as possible within the designated area to ensure that the information is protected from being overstamped by subsequent **indorsements.** The location requirement for subsequent collecting bank **indorsements** (not including returning bank **indorsements)** limits these **indorsements** to the area on the back of the **check** from the leading edge to 3.0 inches from the leading edge of the **check.** The area from the trailing edge of the **check** to 1.5 inches from the trailing edge is commonly used for the payee **indorsement.**

3. The standard requires depositary banks to use either purple or black ink. The Board encourages depositary banks to **indorse checks** in purple ink where possible, because use of a unique ink color will facilitate the speedy identification of the depositary bank. Black ink, however, may be used when use of purple ink is not feasible, such as where a bank uses the same equipment to apply both depositary bank and subsequent collecting bank **indorsements,** and the equipment has only one source of ink.

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4. The standard requires subsequent collecting banks to use an ink color other than purple for their indorsements. The standard also requires the depositary bank's indorsement to include its nine-digit routing number set off by arrows, the bank's name and location, and the indorsement date, and permits the indorsement to include other identifying information.

5. The standard does not include the fractional routing number for depositary banks; however, a bank may include its fractional routing number or repeat its nine-digit routing number in its indorsement. If a depositary bank includes its routing number in its indorsement more than once, paying and returning banks will be able to identify the depositary bank more readily. Depositary banks should not include information that can be confused with required information. For example, a nine-digit zip code could be confused with the nine-digit routing number.

6. A depositary bank is not required to place a street address in its **indorsement**; however, a bank may want to put an address in its **indorsement** in order to limit the number of locations at which it must accept returned **checks.** In instances where this address is not consistent with the routing number in the **indorsement,** the depositary bank is required to accept returned **checks** at a branch or head office consistent with the routing number. Banks should note, however, that Sec. 229.32 requires a depositary bank to accept returned **checks** at the location(s) it accepts forward collection **checks.** The inclusion of a depositary bank's telephone number where it would receive notices of

large-dollar returns in its **indorsements** is optional.

7. Under the U.C.C., a specific guarantee of prior indorsement is not necessary. (See U.C.C. 4-207(a) and 4-208(a).) Use of guarantee language in indorsements, such as 'P.E.G.' ('prior endorsements guaranteed'), may result in reducing the type size used in bank indorsements, thereby making them more difficult to read. Use of this language may make it more difficult for other banks to identify the depositary bank. Subsequent collecting bank indorsements may not include this language.

8. The standard for returning banks requires a returning bank to apply an **indorsement** that avoids the area on the back of the **check** from 3.0 inches from the leading edge of the **check** to the trailing edge--the area reserved for the payee and depositary bank **indorsements.** Returning bank **indorsements** may differ from subsequent collecting bank **indorsements.** The use of various methods to process returns using a variety of equipment also may cause returning bank **indorsements** to vary substantially in form, content, and placement on the **check.** Thus, a returning bank **indorsement** may be on the face of the **check** or on the back of the **check.** A returning bank **indorsement** may not be in purple ink. No content requirements have been adopted for the returning bank **indorsement.**

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9. If the bank maintaining the account into which a **check** is deposited agrees with another bank (a correspondent, ATM operator, or lock box operator) to have the other bank accept returns and notices of nonpayment for the bank of account, the **indorsement** placed on the **check** as the depositary bank **indorsement** may be the **indorsement** of the bank that acts as correspondent, ATM operator, or lock box operator as provided in paragraph (d) of this section.

10. The backs of many **checks** bear pre-printed information or blacked out areas for various reasons. For example, some **checks** are printed with a carbon band across the back that allows the transfer of information from the **check** to a ledger with one writing. Also, contracts or loan agreements are printed on certain **checks.** Other **checks** that are mailed to recipients may contain areas on the back that are blacked out so that they may not be read through the mailer. On the deposit side, the payee of the **check** may place its **indorsement** or information identifying the drawer of the **check** in the area specified for the depositary bank **indorsement,** thus making the depositary bank **indorsement** unreadable.

11. The **indorsement** standard does not prohibit the use of a carbon band or other printed or written matter on the backs of **checks** and does not require banks to avoid placing their **indorsements** in these areas. Nevertheless, **checks** will be handled more efficiently if depositary banks design **indorsement** stamps so that the nine-digit routing number avoids the carbon band area. **Indorsing** parties other than banks, e.g., corporations, will benefit from the faster return of **checks** if they protect the identifiability and legibility of the depositary bank **indorsement** by staying **clear** of the area reserved for the depositary bank **indorsement.**

12. Section 229.38(d) allocates responsibility for loss resulting from a delay in return of a **check** due to **indorsements** that are unreadable because of material on the back of the **check.** The depositary bank is responsible for a loss resulting from a delay in return caused by the condition of the **check** arising after its issuance until its acceptance by the depositary bank that made the depositary bank's **indorsement** illegible. The paying bank is responsible for loss resulting from a delay in return caused by **indorsements** that are not readable because of other material on the back of the **check** at the time that it was issued. Depositary and paying banks may shift these risks to their customers by agreement.

13. The standard does not require the paying bank to **indorse** the **check**; however, if a paying bank does **indorse** a **check** that is returned, it should follow the **indorsement** standard for returning banks. The standard requires collecting and returning banks to **indorse** the **check** for tracing purposes.

B. 229.35(b) Liability of Bank Handling Check

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1. When a **check** is sent for forward collection, the collection process results in a chain of **indorsements** extending from the depositary bank through any subsequent collecting banks to the paying bank. This section extends the **indorsement** chain through the paying bank to the returning banks, and would permit each bank to recover from any prior **indorser** if the claimant bank does not receive payment for the **check** from a subsequent bank in the collection or return chain. For example, if a returning bank returned a **check** to an insolvent depositary bank, and did not receive the full amount of the **check** from the failed bank, the returning bank could obtain the unrecovered amount of the **check** from any bank prior to it in the collection and return chain including the paying bank. Because each bank in the collection and return chain could recover from a prior bank, any loss would fall on the first collecting bank that received the **check** from the depositary bank. To avoid circuity of actions, the returning bank could recover directly from the first collecting bank. Under the U.C.C., the first collecting bank might ultimately recover from the depositary bank's customer or from the other parties on the **check.**

2. Where a check is returned through the same banks used for the forward collection of the check, priority during the forward collection process controls over priority in the return process for the purpose of determining prior and subsequent banks under this regulation.

3. Where a returning bank is insolvent and fails to pay the paying bank or a prior returning bank for a returned check, Sec. 229.39(a) requires the receiver of the failed bank to return the check to the bank that transferred the check to the failed bank. That bank then either could continue the return to the depositary bank or recover based on this paragraph. Where the paying bank is insolvent, and fails to pay the collecting bank, the collecting bank also could recover from a prior collecting bank under this paragraph, and the bank from which it recovered could in turn recover from its prior collecting bank until the loss settled on the depositary bank (which could recover from its customer).

4. A bank is not required to make a claim against an insolvent bank before exercising its right to recovery under this paragraph. Recovery may be made by charge-back or by other means. This right of recovery also is permitted even where nonpayment of the check is the result of the claiming bank's negligence such as failure to make expeditious return, but the claiming bank remains liable for its negligence under Sec. 229.38.

5. This liability is imposed on a bank handling a **check** for collection or return regardless of whether the bank's **indorsement** appears on the **check.** Notice must be sent under this paragraph to a prior bank from which recovery is sought reasonably promptly after a bank learns that it did not receive payment from another bank, and learns the identity of the prior bank. Written notice reasonably identifying the **check** and the basis for recovery is sufficient if the **check** is not available. Receipt of notice by the bank against which the claim is made is not a precondition to recovery by charge-back or other means; however, a bank may be liable for negligence for failure to provide timely notice. A paying or returning bank also may recover from a prior collecting bank as provided in ss 229.30(b) and 229.31(b). This provision is not a

substitute for a paying or returning bank making expeditious return under Secs. 229.30(a) or 229.31(b). This paragraph does not affect a paying bank's accountability for a **check** under U.C.C. 4-215(a) and 4-302. Nor does this paragraph affect a collecting bank's accountability under U.C.C. 4-213 and 4-215(d). A collecting bank becomes accountable upon receipt of final settlement as provided in the foregoing U.C.C. sections. The term final settlement in Secs. 229.31 (c), 229.32 (b), and 229.36(d) is intended to be consistent with the use of the term final settlement in the U.C.C. (e.g., U.C.C. 4-213, 4-214, and 4-215). (See also Sec. 229.2(cc) and Commentary.)

---------- **Page 60959 follows** ----------

6. This paragraph also provides that a bank may have the rights of a holder based on the handling of the **check** for collection or return. A bank may become a holder or a holder in due course regardless of whether prior banks have complied with the **indorsement** standard in Sec. 229.35(a) and Appendix D.

7. This paragraph affects the following provisions of the U.C.C., and may affect other provisions:

a. Section 4-214(a), in that the right to recovery is not based on provisional settlement, and recovery may be had from any prior bank. Section 4-214(a) would continue to permit a depositary bank to recover a provisional settlement from its customer. (See Sec. 229.33(d).)

b. Section 3-415 and related provisions (such as section 3-503), in that such provisions would not apply as between banks, or as between the depositary bank and its customer.

C. 229.35(c) Indorsement by Bank

1. This section protects the rights of a customer depositing a **check** in a bank without requiring the words 'pay any bank,' as required by the U.C.C. (See U.C.C. 4-201(b).) Use of this language in a depositary bank's **indorsement** will make it more difficult for other banks to identify the depositary bank. The **indorsement** standard in Appendix D prohibits such material in subsequent collecting bank **indorsements.** The existence of a bank **indorsement** provides notice of the restrictive **indorsement** without any additional words.

D. 229.35(d) Indorsement for Depositary Bank

1. This section permits a depositary bank to arrange with another bank to **indorse checks.** This practice may occur when a correspondent **indorses** for a respondent, or when the bank servicing an ATM or lock box **indorses** for the bank maintaining the account in which the **check** is deposited--i.e., the depositary bank. If the **indorsing** bank applies the depositary bank's **indorsement, checks** will be returned to the depositary bank. If the **indorsing** bank does not apply the depositary bank's **indorsement,** by agreement with the depositary bank it may apply its own **indorsement** as the depositary bank **indorsement.** In that case, the depositary bank's own **indorsement** on the **check** (if any) should avoid the location reserved for the depositary bank. The actual depositary bank remains responsible for the availability and other requirements of Subpart B, but the bank **indorsing** as depositary bank is considered the depositary bank for purposes of Subpart C. The **check** will be returned, and notice of nonpayment will be given, to the bank **indorsing** as depositary bank.

2. Because the depositary bank for Subpart B purposes will desire prompt notice of nonpayment, its arrangement with the **indorsing** bank should provide for prompt notice of nonpayment. The bank **indorsing** as depositary bank may require the depositary bank to agree to take up the **check** if the **check** is not paid even

Returning banks also would be required to act on such **checks** within their midnight deadline. Further, in order to avoid complicating the process of returning **checks** generally, banks without accounts are required to use the standard **indorsement,** and their **checks** are returned by returning banks and paid for by the depositary bank under the same rules as **checks** deposited in other banks, with the exception of the expeditious return and notice of nonpayment requirements of ss 229.30(a), 229.31(a), and 229.33.

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2. The expeditious return requirements also apply to a check deposited in a bank that is not a depository institution. Federal Reserve Banks, Federal Home Loan Banks, private bankers, and possibly certain industrial banks are not depository institutions within the meaning of the Act, and therefore are not subject to the expedited availability and disclosure requirements of Subpart B. These banks do, however, maintain accounts as defined in Sec. 229.2(a), and a paying bank returning a check to one of these banks would be required to return the check to the depositary bank, in accordance with the requirements of this section.

F. 229.30(f) Notice in Lieu of Return

1. A **check** that is lost or otherwise unavailable for return may be returned by sending a legible copy of both sides of the **check** or, if such a copy is not available to the paying bank, a written notice of nonpayment containing the information specified in Sec. 229.33(b). The copy or written notice must **clearly** indicate it is a notice in lieu of return and must be handled in the same manner as other returned **checks.** Notice by telephone, telegraph, or other electronic transmission, other than a legible facsimile or similar image transmission of both sides of the **check,** does not satisfy the requirements for a notice in lieu of return. The requirement for a writing and the indication that the notice is a substitute for the returned **check** is necessary so that the returning and depositary banks are informed that the notice carries value. Notice in lieu of return is permitted only when a bank does not have and cannot obtain possession of the **check** or must retain possession of the **check** for protest. A **check** is not unavailable for return if it is merely difficult to retrieve from a filing system or from storage by a keeper of **checks** in a truncation system. A notice in lieu of return may be used by a bank handling a returned **check** that has been lost or destroyed, including when the original returned **check** has been charged back as lost or destroyed as provided in Sec. 229.35(b). A bank using a notice in lieu of return gives a warranty under Sec. 229.34(a)(4) that the original **check** has not been and will not be returned.

2. The requirement of this paragraph supersedes the requirement of U.C.C. 4-301(a) as to the form and information required of a notice of dishonor or nonpayment. Reference in the regulation and this commentary to a returned check includes a notice in lieu of return unless the context indicates otherwise.

3. The notice in lieu of return is subject to the provisions of Sec. 229.30 and is treated like a returned check for settlement purposes. If the original check is over $2,500, the notice of nonpayment under Sec. 229.33 is still required, but may be satisfied by the notice in lieu of return if the notice in lieu meets the time and information requirements of Sec. 229.33.

4. If not all of the information required by Sec. 229.33(b) is available, the paying bank may make a claim against any prior bank handling the check as provided in Sec. 229.35(b).

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G. 229.30(g) Reliance on Routing Number

1. Although Sec. 229.35 and Appendix D require that the depositary bank **indorsement** contain its nine-digit routing number, it is possible that a returned **check** will bear the routing number of the depositary bank in fractional, nine-digit, or other form. This paragraph permits a paying bank to rely on the routing number of the depositary bank as it appears on the **check** (in the depositary bank's **indorsement)** when it is received by the paying bank.

2. If there are inconsistent routing numbers, the paying bank may rely on any routing number designating the depositary bank. The paying bank is not required to resolve the inconsistency prior to processing the check. The paying bank remains subject to the requirement to act in good faith and use ordinary care under Sec. 229.38(a).

XVII. Section 229.31 Returning Bank's Responsibility for Return of Checks

A. 229.31(a) Return of Checks

1. The standards for return of checks established by this section are similar to those for paying banks in Sec. 229.30(a). This section requires a returning bank to return a returned check expeditiously if it agrees to handle the returned check for expeditious return under this paragraph. In effect, the returning bank is an agent or subagent of the paying bank and a subagent of the depositary bank for the purposes of returning the check.

2. A returning bank agrees to handle a returned check for expeditious return to the depositary bank if it:

a. Publishes or distributes availability schedules for the return of returned checks and accepts the returned check for return;

b. Handles a returned check for return that it did not handle for forward collection; or

c. Otherwise agrees to handle a returned check for expeditious return.

3. Two-day/four-day test. As in the case of a paying bank, a returning bank's return of a returned check is expeditious if it meets either of two tests. Under the 'two-day/four-day' test, the check must be returned so that it would normally be received by the depositary bank by 4:00 p.m. either two or four business days after the check was presented to the paying bank, depending on whether or not the paying bank is located in the same check processing region as the depositary bank. This is the same test as the two-day/four-day test applicable to paying banks. (See Commentary to Sec. 229.30(a).) While a returning bank will not have first hand knowledge of the day on which a check was presented to the paying bank, returning banks may, by agreement, allocate with paying banks liability for late return based on the delays caused by each. In effect, the two-day/four day test protects all paying and returning banks that return checks from claims that they failed to return a check expeditiously, where the check is returned within the specified time following presentment to the paying bank, or a later time as would result from unforeseen delays.

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4. Forward collection test.

a. The 'forward collection' test is similar to the forward collection test for paying banks. Under this test, a returning bank must handle a returned

check in the same manner that a similarly situated collecting bank would handle a check of similar size drawn on the depositary bank for forward collection. A similarly situated bank is a bank (other than a Federal Reserve Bank) that is of similar asset size and check handling activity in the same community. A bank has similar check handling activity if it handles a similar volume of checks for forward collection as the forward collection volume of the returning bank.

b. Under the forward collection test, a returning bank must accept returned checks, including both qualified and other returned checks ('raw returns'), at approximately the same times and process them according to the same general schedules as checks handled for forward collection. Thus, a returning bank generally must process even raw returns on an overnight basis, unless its time limit is extended by one day to convert a raw return to a qualified returned check.

5. Cut-off hours. A returning bank may establish earlier cut-off hours for receipt of returned checks than for receipt of forward collection checks, but the cut-off hour for returned checks may not be earlier than 2:00 p.m. The returning bank also may set different sorting requirements for returned checks than those applicable to other checks. Thus, a returning bank may allow itself more processing time for returns than for forward collection checks. All returned checks received by a cut-off hour for returned checks must be processed and dispatched by the returning bank by the time that it would dispatch forward collection checks received at a corresponding forward collection cut-off hour that provides for the same or faster availability for checks destined for the same depositary banks.

6. Examples.

a. If a returning bank receives a returned **check** by its cut-off hour for returned **checks** on Monday and the depositary bank and the returning bank are participants in the same **clearinghouse,** the returning bank should arrange to have the returned **check** received by the depositary bank by Tuesday. This would be the same day that it would deliver a forward collection **check** drawn on the depositary bank and received by the returning bank at a corresponding forward collection cut-off hour on Monday.

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b. i. If a returning bank receives a returned check, and the returning bank normally would collect a forward collection check drawn on the depositary bank by sending the forward collection check to a correspondent or a Federal Reserve Bank by courier, the returning bank could send the returned check in the same manner if the correspondent has agreed to handle returned checks expeditiously under Sec. 229.31(a). The returning bank would have to deliver the check by the correspondent's or Federal Reserve Bank's cut-off hour for returned checks that corresponds to its cut-off hour for forward collection checks drawn on the depositary bank. A returning bank may take a day to convert a check to a qualified returned check. Where the forward collection checks are delivered by courier, mailing the returned checks would not meet the duty established by this section for returning banks.

ii. A returning bank must return a check to the depositary bank by courier or other means as fast as a courier, if similarly situated returning banks use couriers to deliver their forward collection checks to the depositary bank.

iii. For some depositary banks, no community practice exists as to delivery of checks. For example, a credit union whose customers use payable-through drafts normally does not have checks presented to it because the drafts are normally sent to the payable-through bank for collection. In these circumstances, the community standard is established by taking into account the dollar volume of the checks being sent to the depositary bank and the location

of the depositary bank, and determining whether similarly situated banks normally would deliver forward collection checks to the depositary bank, taking into account the particular risks associated with returned checks. Where the community standard does not require courier delivery, other means of delivery, including mail, are acceptable.

7. Qualified returned checks.

a. The expeditious return requirement for a returning bank in this regulation is more stringent in many cases than the duty of a collecting bank to exercise ordinary care under U.C.C. 4-202 in returning a check. A returning bank is under a duty to act as expeditiously in returning a check as it would in the forward collection of a check. Notwithstanding its duty of expeditious return, its midnight deadline under U.C.C. 4-202 and Sec. 210.12(a) of Regulation J (12 CFR 210.12(a)), under the forward collection test, a returning bank may take an extra day to qualify a returned check. A qualified returned check will be handled by subsequent returning banks more efficiently than a raw return. This paragraph gives a returning bank an extra business day beyond the time that would otherwise be required to return the returned check to convert a returned check to a qualified returned check. The qualified returned check must include the routing number of the depositary bank, the amount of the check, and a return identifier encoded on the check in magnetic ink.

b. If the returning bank is sending the returned check directly to the depositary bank, this extra day is not available because preparing a qualified returned check will not expedite handling by other banks. If the returning bank makes an encoding error in creating a qualified returned check, it may be liable under Sec. 229.38 for losses caused by any negligence. The returning bank would not lose the one-day extension available to it for creating a qualified returned check because of an encoding error.

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8. Routing of returned check.

a. Under Sec. 229.31(a), the returning bank is authorized to route the returned check in a variety of ways:

i. It may send the returned check directly to the depositary bank by courier or other expeditious means of delivery; or

ii. It may send the returned check to any returning bank agreeing to handle the returned check for expeditious return to the depositary bank under this section regardless of whether or not the returning bank handled the check for forward collection.

b. If the returning bank elects to send the returned check directly to the depositary bank, it is not required to send the check to the branch of the depositary bank that first handled the check. The returned check may be sent to the depositary bank at any location permitted under Sec. 229.32(a).

9. Responsibilities of returning bank. In meeting the requirements of this section, the returning bank is responsible for its own actions, but not those of the paying bank, other returning banks, or the depositary bank. (See U.C.C. 4-202(c) regarding the responsibility of collecting banks.) For example, if the paying bank has delayed the start of the return process, but the returning bank acts in a timely manner, the returning bank may satisfy the requirements of this section even if the delayed return results in a loss to the depositary bank. (See Sec. 229.38.) A returning bank must handle a notice in lieu of return as expeditiously as a returned check.

10. U.C.C. sections affected. This paragraph directly affects the following provisions of the U.C.C., and may affect other sections or provisions:

a. Section 4-202(b), in that time limits required by that section may be affected by the additional requirement to make an expeditious return.

b. Section 4-214(a), in that settlement for returned checks is made under Sec. 229.31(c) and not by charge-back of provisional credit, and in that the time limits may be affected by the additional requirement to make an expeditious return.

B. 229.31(b) Unidentifiable Depositary Bank

1. This section is similar to Sec. 229.30(b), but applies to returning banks instead of paying banks. In some cases a returning bank will be unable to identify the depositary bank with respect to a **check.** Returning banks agreeing to handle **checks** for return to depositary banks under Sec. 229.31(a) are expected to be expert in identifying depositary bank **indorsements.** In the limited cases where the returning bank cannot identify the depositary bank, the returning bank may send the returned **check** to a returning bank that agrees to handle the returned **check** for expeditious return under Sec. 229.31(a), or it may send the returned **check** to a bank that handled the **check** for forward collection, even if that bank does not agree to handle the returned **check** expeditiously under Sec. 229.31(a).

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2. If the returning bank itself handled the check for forward collection, it may send the returned check to a collecting bank that was prior to it in the forward collection process, which will be better able to identify the depositary bank. If there are no prior collecting banks, the returning bank must research the collection of the check and identify the depositary bank. As in the case of paying banks under Sec. 229.30(b), a returning bank's sending of a check to a bank that handled the check for forward collection under Sec. 229.31(b) is not subject to the expeditious return requirements of Sec. 229.31(a).

3. The returning bank's return of a check under this paragraph is subject to the midnight deadline under U.C.C. 4-202(b). (See definition of returning bank in Sec. 229.2(cc).)

4. Where a returning bank receives a check that it does not agree to handle expeditiously under Sec. 229.31(a), such as a check sent to it under Sec. 229.30(b), but the returning bank is able to identify the depositary bank, the returning bank must thereafter return the check expeditiously to the depositary bank. The returning bank returns a check expeditiously under this paragraph if it returns the check by the same means it would use to return a check drawn on it to the depositary bank or by other reasonably prompt means.

5. As in the case of a paying bank returning a check under Sec. 229.30(b), a returning bank returning a check under this paragraph to a bank that has not agreed to handle the check expeditiously must advise that bank that it is unable to identify the depositary bank. This advice must be conspicuous, such as a stamp on each check for which the depositary bank is unknown if such checks are commingled with other returned checks, or, if such checks are sent in a separate cash letter, by one notice on the cash letter. The returned check may not be prepared for automated return.

C. 229.31(c) Settlement

1. Under the U.C.C., a collecting bank receives settlement for a check when it is presented to the paying bank. The paying bank may recover the settlement when the paying bank returns the check to the presenting bank. Under this regulation, however, the paying bank may return the check directly to the depositary bank or through returning banks that did not handle the check for forward collection. On these more efficient return paths, the paying bank does

b. In addition to stating what their specific availability policy is in most cases, banks that may delay or extend the time when deposits are available on a case-by-case basis must: state that from time to time funds may be available for withdrawal later than the time periods in their specific policy disclosure, disclose the latest time that a customer may have to wait for deposited funds to be available for withdrawal when a case-by-case hold is placed, state that customers will be notified when availability of a deposit is delayed on a case-by-case basis, and advise customers to ask if they need to be sure of the availability of a particular deposit.

c. A bank that imposes delays on a case-by-case basis is still subject to the availability requirements of this regulation. If the bank imposes a delay on a particular deposit that is not longer than the availability required by Sec. 229.12 for local and nonlocal checks, the reason for the delay need not be based on the exceptions provided in Sec. 229.13. If the delay exceeds the time periods permitted under Sec. 229.12, however, then it must be based on an exception provided in Sec. 229.13, and the bank must comply with the Sec. 229.13 notice requirements. A bank that imposes delays on a case-by-case basis may avail itself of the one-time notice provisions in Sec. 229.13(g)(2) and (3) for deposits to which those provisions apply.

2. Notice at time of case-by-case delay.

a. In addition to including the disclosures required by paragraph (c)(1) of this section in their specific availability policy disclosure, banks that delay or extend the time period when funds are available for withdrawal on a case-by-case basis must give customers a notice when availability of funds from a particular deposit will be delayed or extended beyond the time when deposited funds are generally available for withdrawal. The notice must state that a delay is being imposed and indicate when the funds will be available. In addition, the notice must include the account number, the date and amount of the deposit, and the amount of the deposit being delayed.

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b. If notice of the delay was not given at the time the deposit was made and the bank assesses overdraft or returned check fees on accounts when a case-by-case hold has been placed, the case-by-case hold notice provided to the customer must include a notice concerning overdraft or returned check fees. The notice must state that the customer may be entitled to a refund of any overdraft or returned check fees that result from the deposited funds not being available if the check that was deposited was in fact paid by the payor bank, and explain how to request a refund of any fees. (See Sec. 229.16(c)(3).)

c. The requirement that the case-by-case hold notice state the day that funds will be made available for withdrawal may be met by stating the date or the number of business days after deposit that the funds will be made available. This requirement is satisfied if the notice provides information sufficient to indicate when funds will be available and the amounts that will be available at those times. For example, for a deposit involving more than one check, the bank need not provide a notice that discloses when funds from each individual item in the deposit will be available for withdrawal. Instead, the bank may provide a total dollar amount for each of the time periods when funds will be available, or provide the customer with an explanation of how to determine the amount of the deposit that will be held and when the held funds will be available for withdrawal.

d. For deposits made in person to an employee of the depositary bank, the notice generally must be given at the time of the deposit. The notice at the time of the deposit must be given to the person making the deposit, that is, the 'depositor.' The depositor need not be the customer holding the account. For

other deposits, such as deposits received at an ATM, lobby deposit box, night depository, through the mail, or by armored car, notice must be mailed to the customer not later than the close of the business day following the banking day on which the deposit was made. Notice to the customer also may be provided not later than the close of the business day following the banking day on which the deposit was made if the decision to delay availability is made after the time of the deposit.

3. Overdraft and returned check fees. If a depositary bank delays or extends the time when funds from a deposited check are available for withdrawal on a case-by-case basis and does not provide a written notice to its depositor at the time of deposit, the depositary bank may not assess any overdraft or returned check fees (such as an insufficient funds charge) or charge interest for use of an overdraft line of credit, if the deposited check is paid by the paying bank and these fees would not have occurred had the additional case-by-case delay not been imposed. A bank may assess an overdraft or returned check fee under these circumstances, however, if it provides notice to the customer in the notice required by paragraph (c)(2) of this section that the fee may be subject to refund, and refunds the fee upon the request of the customer when required to do so. The notice must state that the customer may be entitled to a refund of any overdraft or returned check fees that are assessed if the deposited check is paid, and indicate where such requests for a refund of overdraft fees should be directed. Paragraph (c)(3) applies when a bank provides a case-by-case notice in accordance with paragraph (c)(2) and does not apply if the bank has provided an exception hold notice in accordance with Sec. 229.13.

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D. 229.16(d) Credit Union Notice of Interest Payment Policy

1. This paragraph sets forth the special disclosure requirement for credit unions that delay accrual of interest or dividends for all cash and check deposits beyond the date of receiving provisional credit for checks being deposited. (The interest payment requirement is set forth in Sec. 229.14(a).) Such credit unions are required to describe their policy with respect to accrual of interest or dividends on deposits in their specific availability policy disclosure.

XI. Section 229.17 Initial Disclosures

A. This paragraph requires banks to provide a notice of their availability policy to all potential customers prior to opening an account. The requirement of a notice prior to opening an account requires banks to provide disclosures prior to accepting a deposit to open an account. Disclosures must be given at the time the bank accepts an initial deposit regardless of whether the bank has opened the account yet for the customer. If a bank, however, receives a written request by mail from a person asking that an account be opened and the request includes an initial deposit, the bank may open the account with the deposit, provided the bank mails the required disclosures to the customer not later than the business day following the banking day on which the bank receives the deposit. Similarly, if a bank receives a telephone request from a customer asking that an account be opened with a transfer from a separate account of the customer's at the bank, the disclosure may be mailed not later than the business day following the banking day of the request.

XII. Section 229.18 Additional Disclosure Requirements

A. 229.18(a) Deposit Slips

1. This paragraph requires banks to include a notice on all preprinted deposit slips. The deposit slip notice need only state, somewhere on the front of the deposit slip, that deposits may not be available for immediate withdrawal. The notice is required only on preprinted deposit slips--those printed with the customer's account number and name and furnished by the bank in response to a customer's order to the bank. A bank need not include the notice on deposit slips that are not preprinted and supplied to the customer--such as counter deposit slips--or on those special deposit slips provided to the customer under Sec. 229.10(c). A bank is not responsible for ensuring that the notice appear on deposit slips that the customer does not obtain from or through the bank. This paragraph applies to preprinted deposit slips furnished to customers on or after September 1, 1988.

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B. 229.18(b) Locations Where Employees Accept Consumer Deposits

1. This paragraph describes the statutory requirement that a bank post in each location where its employees accept consumer deposits a notice of its availability policy pertaining to consumer accounts. The notice that is required must specifically state the availability periods for the various deposits that may be made to consumer accounts. The notice need not be posted at each teller window, but the notice must be posted in a place where consumers seeking to make deposits are likely to see it before making their deposits. For example, the notice might be posted at the point where the line forms for teller service in the lobby. The notice is not required at any drive-through teller windows nor is it required at night depository locations, or at locations where consumer deposits are not accepted.

C. 229.18(c) Automated Teller Machines

1. This paragraph sets forth the required notices for ATMs. Paragraph (c)(1) provides that the depositary bank is responsible for posting a notice on all ATMs at which deposits can be made to accounts at the depositary bank. The depositary bank may arrange for a third party, such as the owner or operator of the ATM, to post the notice and indemnify the depositary bank from liability if the depositary bank is liable under Sec. 229.21 for the owner or operator failing to provide the required notice.

2. The notice may be posted on a sign, shown on the screen, or included on deposit envelopes provided at the ATM. This disclosure must be given before the customer has made the deposit. Therefore, a notice provided on the customer's deposit receipt or appearing on the ATM's screen after the customer has made the deposit would not satisfy this requirement.

3. Paragraph (c)(2) requires a depositary bank that operates an off-premise ATM from which deposits are removed not more than two times a week to make a disclosure of this fact on the off-premise ATM. The notice must disclose to the customer the days on which deposits made at the ATM will be considered received.

D. 229.18(d) Upon Request

1. This paragraph requires banks to provide written notice of their specific availability policy to any person upon that person's oral or written request. The notice must be sent within a reasonable period of time following receipt of the request.

E. 229.18(e) Changes in Policy

1. This paragraph requires banks to send notices to their customers when the banks change their availability policies with regard to consumer accounts. A notice may be given in any form as long as it is clear and conspicuous. If the bank gives notice of a change by sending the customer a complete new availability disclosure, the bank must direct the customer to the changed terms in the disclosure by use of a letter or insert, or by highlighting the changed terms in the disclosure.

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2. Generally, a bank must send a notice at least 30 calendar days before implementing any change in its availability policy. If the change results in faster availability of deposits--for example, if the bank changes its availability for nonlocal checks from the fifth business day after deposit to the fourth business day after deposit--the bank need not send advance notice. The bank must, however, send notice of the change no later than 30 calendar days after the change is implemented. A bank is not required to give a notice when there is a change in Appendix B (reduction of schedules for certain nonlocal checks).

3. A bank that has provided its customers with a list of ATMs under Sec. 229.16(b)(5) shall provide its customers with an updated list of ATMs once a year if there are changes in the list of ATMs previously disclosed to the customers.

XIII. Section 229.19 Miscellaneous

A. 229.19(a) When Funds Are Considered Deposited

1. The time funds must be made available for withdrawal under this subpart is determined by the day the deposit is made. This paragraph provides rules to determine the day funds are considered deposited in various circumstances.

2. Staffed facilities and ATMs. Funds received at a staffed teller station or ATM are considered deposited when received by the teller or placed in the ATM. Funds deposited to a deposit box in a bank lobby that is accessible to customers only during regular business hours generally are considered deposited when placed in the lobby box; a bank may, however, treat deposits to lobby boxes the same as deposits to night depositories (as provided in Sec. 229.19(a)(3)), provided a notice appears on the lobby box informing the customer when such funds will be considered deposited.

3. Mail. Funds mailed to the depositary bank are considered deposited on the banking day they are received by the depositary bank. The funds are received by the depositary bank at the time the mail is delivered to the bank, even if it is initially delivered to a mail room, rather than the check processing area.

4. Other facilities.

a. In addition to deposits at staffed facilities, at ATMs, and by mail, funds may be deposited at a facility such as a night depository or a lock box. A night depository is a receptacle for receipt of deposits, typically used by

corporate depositors when the branch is closed. Funds deposited at a night depository are considered deposited on the banking day the deposit is removed, and the contents of the deposit are accessible to the depositary bank for processing. For example, some businesses deposit their funds in a locked bag at the night depository late in the evening, and return to the bank the following day to open the bag. Other depositors may have an agreement with their bank that the deposit bag must be opened under the dual control of the bank and the depositor. In these cases, the funds are considered deposited when the customer returns to the bank and opens the deposit bag.

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b. A lock box is a post office box used by a corporation for the collection of bill payments or other check receipts. The depositary bank generally assumes the responsibility for collecting the mail from the lock box, processing the checks, and crediting the corporation for the amount of the deposit. Funds deposited through a lock box arrangement are considered deposited on the day the deposit is removed from the lock box and are accessible to the depositary bank for processing.

5. Certain off-premise ATMs. A special provision is made for certain off-premise ATMs that are not serviced daily. Funds deposited at such an ATM are considered deposited on the day they are removed from the ATM, if the ATM is not serviced more than two times each week. This provision is intended to address the practices of some banks of servicing certain remote ATMs infrequently. If a depositary bank applies this provision with respect to an ATM, a notice must be posted at the ATM informing depositors that funds deposited at the ATM may not be considered deposited until a future day, in accordance with Sec. 229.18.

6. Banking day of deposit.

a. This paragraph also provides that a deposit received on a day that the depositary bank is closed, or after the bank's cut-off hour, may be considered made on the next banking day. Generally, for purposes of the availability schedules of this subpart, a bank may establish a cut-off hour of 2 p.m. or later for receipt of deposits at its head office or branch offices. For receipt of deposits at ATMs or off-premise facilities, such as night depositories or lock boxes, the depositary bank may establish a cut-off hour of 12 noon or later (either local time of the branch or other location of the depositary bank at which the account is maintained or local time of the ATM or off-premise facility). The depositary bank must use the same timing method for establishing the cut-off hour for all ATMs and off-premise facilities used by its customers. The choice of cut-off hour must be reflected in the bank's internal procedures, and the bank must inform its customers of the cut-off hour upon request. This earlier cut-off for ATM or off-premise deposits is intended to provide greater flexibility in the servicing of ATMs and other off-premise facilities.

b. Different cut-off hours may be established for different types of deposits. For example, a bank may establish a 2 p.m. cut-off for the receipt of check deposits, but a later cut-off for the receipt of wire transfers. Different cut-off hours also may be established for deposits received at different locations. For example, a different cut-off may be established for ATM deposits than for over-the-counter deposits, or for different teller stations at the same branch. With the exception of the 12 noon cut-off for deposits at ATMs and off-premise facilities, no cut-off hour for receipt of deposits for purposes of this subpart can be established earlier than 2 p.m.

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c. A bank is not required to remain open until 2 p.m. If a bank closes before

2 p.m., deposits received after the closing may be considered deposited on the next banking day. Further, as Sec. 229.2(f) defines the term banking day as the portion of a business day on which a bank is open to the public for substantially all of its banking functions, a day, or a portion of a day, is not necessarily a banking day merely because the bank is open for only limited functions, such as keeping drive-in or walk-up teller windows open, when the rest of the bank is closed to the public. For example, a banking office that usually provides a full range of banking services may close at 12 noon but leave a drive-in teller window open for the limited purpose of receiving deposits and making cash withdrawals. Under those circumstances, the bank is considered closed and may consider deposits received after 12 noon as having been received on the next banking day. The fact that a bank may reopen for substantially all of its banking functions after 2 p.m., or that it continues its back office operations throughout the day, would not affect this result. A bank may not, however, close individual teller stations and reopen them for next-day's business before 2 p.m. during a banking day.

B. 229.19(b) Availability at Start of Business Day

1. If funds must be made available for withdrawal on a business day, the funds must be available for withdrawal by the later of 9 a.m. or the time the depositary bank's teller facilities, including ATMs, are available for customer account withdrawals, except under the special rule for cash withdrawals set forth in Sec. 229.12(d). Thus, if a bank has no ATMs and its branch facilities are available for customer transactions beginning at 10 a.m., funds must be available for customer withdrawal beginning at 10 a.m. If the bank has ATMs that are available 24 hours a day, rather than establishing 12:01 a.m. as the start of the business day, this paragraph sets 9 a.m. as the start of the day with respect to ATM withdrawals. The Board believes that this rule provides banks with sufficient time to update their accounting systems to reflect the available funds in customer accounts for that day.

2. The start of business is determined by the local time of the branch or other location of the depositary bank at which the account is maintained. For example, if funds in a customer's account at a west coast bank are first made available for withdrawal at the start of business on a given day, and the customer attempts to withdraw the funds at an east coast ATM, the depositary bank is not required to make the funds available until 9 a.m. west coast time (12 noon east coast time).

C. 229.19(c) Effect on Policies of Depositary Bank

1. This subpart establishes the maximum hold that may be placed on customer deposits. A depositary bank may provide availability to its customers in a shorter time than prescribed in this subpart. A depositary bank also may adopt different funds availability policies for different segments of its customer base, as long as each policy meets the schedules in the regulation. For example, a bank may differentiate between its corporate and consumer customers, or may adopt different policies for its consumer customers based on whether a customer has an overdraft line of credit associated with the account.

2. This regulation does not affect a depositary bank's right to accept or reject a check for deposit, to charge back the customer's account based on a returned check or notice of nonpayment, or to claim a refund for any credit provided to the customer. For example, even if a check is returned or a notice of nonpayment is received after the time by which funds must be made available for withdrawal in accordance with this regulation, the depositary bank may

charge back the customer's account for the full amount of the check. (See Sec. 229.33(d) and Commentary.)

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3. Nothing in the regulation requires a depositary bank to have facilities open for customers to make withdrawals at specified times or on specified days. For example, even though the special cash withdrawal rule set forth in Sec. 229.12(d) states that a bank must make up to $400 available for cash withdrawals no later than 5 p.m. on specific business days, if a bank does not participate in an ATM system and does not have any teller windows open at or after 5 p.m., the bank need not join an ATM system or keep offices open. In this case, the bank complies with this rule if the funds that are required to be available for cash withdrawal at 5 p.m. on a particular day are available for withdrawal at the start of business on the following day. Similarly, if a depositary bank is closed for customer transactions, including ATMs, on a day funds must be made available for withdrawal, the regulation does not require the bank to open.

4. The special cash withdrawal rule in the Act recognizes that the $400 that must be made available for cash withdrawal by 5 p.m. on the day specified in the schedule may exceed a bank's daily ATM cash withdrawal limit and explicitly provides that the Act does not supersede a bank's policy in this regard. As a result, if a bank has a policy of limiting cash withdrawals from automated teller machines to $250 per day, the regulation would not require that the bank dispense $400 of the proceeds of the customer's deposit that must be made available for cash withdrawal on that day.

5. Even though the Act clearly provides that the bank's ATM withdrawal limit is not superseded by the federal availability rules on the day funds must first be made available, the Act does not specifically permit banks to limit cash withdrawals at ATMs on subsequent days when the entire amount of the deposit must be made available for withdrawal. The Board believes that the rationale behind the Act's provision that a bank's ATM withdrawal limit is not superseded by the requirement that funds be made available for cash withdrawal applies on subsequent days. Nothing in the regulation prohibits a depositary bank from establishing ATM cash withdrawal limits that vary among customers of the bank, as long as the limit is not dependent on the length of time funds have been in the customer's account (provided that the permissible hold has expired).

6. Some small banks, particularly credit unions, due to lack of secure facilities, keep no cash on their premises and hence offer no cash withdrawal capability to their customers. Other banks limit the amount of cash on their premises due to bonding requirements or cost factors, and consequently reserve the right to limit the amount of cash each customer can withdraw over-the-counter on a given day. For example, some banks require advance notice for large cash withdrawals in order to limit the amount of cash needed to be maintained on hand at any time.

7. Nothing in the regulation is intended to prohibit a bank from limiting the amount of cash that may be withdrawn at a staffed teller station if the bank has a policy limiting the amount of cash that may be withdrawn, and if that policy is applied equally to all customers of the bank, is based on security, operating, or bonding requirements, and is not dependent on the length of time the funds have been in the customer's account (as long as the permissible hold has expired). The regulation, however, does not authorize such policies if they are otherwise prohibited by statutory, regulatory, or common law.

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D. 229.19(d) Use of Calculated Availability

1. A depositary bank may provide availability to its nonconsumer accounts on a calculated availability basis. Under calculated availability, a specified percentage of funds from check deposits may be made available to the customer on the next business day, with the remaining percentage deferred until subsequent days. The determination of the percentage of deposited funds that will be made available each day is based on the customer's typical deposit mix as determined by a sample of the customer's deposits. Use of calculated availability is permitted only if, on average, the availability terms that result from the sample are equivalent to or more prompt than the requirements of this subpart.

E. 229.19(e) Holds on Other Funds

1. Section 607(d) of the Act (12 U.S.C. 4006(d)) provides that once funds are available for withdrawal under the Act, such funds shall not be frozen solely due to the subsequent deposit of additional checks that are not yet available for withdrawal. This provision of the Act is designed to prevent evasion of the Act's availability requirements.

2. This paragraph clarifies that if a customer deposits a check in an account (as defined in Sec. 229.2(a)), the bank may not place a hold on any of the customer's funds so that the funds that are held exceed the amount of the check deposited or the total amount of funds held are not made available for withdrawal within the times required in this subpart. For example, if a bank places a hold on funds in a customer's non transaction account, rather than a transaction account, for deposits made to the customer's transaction account, the bank may place such a hold only to the extent that the funds held do not exceed the amount of the deposit and the length of the hold does not exceed the time periods permitted by this regulation.

3. These restrictions also apply to holds placed on funds in a customer's account (as defined in Sec. 229.2(a)) if a customer cashes a check at a bank (other than a check drawn on that bank) over the counter. The regulation does not prohibit holds that may be placed on other funds of the customer for checks cashed over the counter, to the extent that the transaction does not involve a deposit to an account. A bank may not, however, place a hold on any account when an 'on us' check is cashed over the counter. 'On us' checks are considered finally paid when cashed (see U.C.C. 4-215(a)(1)).

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F. 229.19(f) Employee Training and Compliance

1. The Act requires banks to take such actions as may be necessary to inform fully each employee that performs duties subject to the Act of the requirements of the Act, and to establish and maintain procedures reasonably designed to assure and monitor employee compliance with such requirements.

2. This paragraph requires a bank to establish procedures to ensure compliance with these requirements and provide these procedures to the employees responsible for carrying them out.

G. 229.19(g) Effect of Merger Transaction

1. After banks merge, there is often a period of adjustment before their operations are consolidated. This paragraph accommodates this adjustment period by allowing merged banks to be treated as separate banks for purposes of this subpart for a period of up to one year after consummation of the merger transaction, except that a customer of any bank that is a party to the transaction that has an established account with that bank may not be treated as a new account holder for any other party to the transaction for purposes of the new account exception of Sec. 229.13(a), and a deposit in any branch of the merged bank is considered deposited in the bank for purposes of the availability schedules in accordance with Sec. 229.19(a).

2. This rule affects the status of the combined entity in several areas. For example, this rule would affect when an ATM is a proprietary ATM (s 229.2(aa) and Sec. 229.12(b)) and when a check is considered drawn on a branch of the depositary bank (s 229.10(c)(1)(vi)).

3. Merger transaction is defined in Sec. 229.2(t).

XIV. Section 229.20 Relation to State Law

A. 229.20(a) In General

1. Several states have enacted laws that govern when banks in those states must make funds available to their customers. The Act provides that any state law in effect on September 1, 1989, that provides that funds be made available in a shorter period of time than provided in this regulation, will supersede the time periods in the Act and the regulation. The Conference Report on the Act clarifies this provision by stating that any state law enacted on or before September 1, 1989, may supersede federal law to the extent that the law relates to the time funds must be made available for withdrawal. H.R. Rep. No. 261, 100th Cong. 1st Sess. at 182 (1987).

2. Thus, if a state had wished to adopt a law governing funds availability, it had to have made that law effective on or before September 1, 1989. Laws adopted after that date do not supersede federal law, even if they provide for shorter availability periods than are provided under federal law. If a state that had a law governing funds availability in effect before September 1, 1989, amended its law after that date, the amendment would not supersede federal law, but an amendment deleting a state requirement would be effective.

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3. If a state provides for a shorter hold for a certain category of checks than is provided for under federal law, that state requirement will supersede the federal provision. For example, most state laws base some hold periods on whether the check being deposited is drawn on an in-state or out-of-state bank. If a state contains more than one check processing region, the state's hold period for in-state checks may be shorter than the federal maximum hold period for nonlocal checks. Thus, the state schedule would supersede the federal schedule to the extent that it applies to in-state, nonlocal checks.

4. The Act also provides that any state law that provides for availability in a shorter period of time than required by federal law is applicable to all federally insured institutions in that state, including federally chartered institutions. If a state law provides shorter availability only for deposits in accounts in certain categories of banks, such as commercial banks, the superseding state law continues to apply only to those categories of banks, rather than to all federally insured banks in the state.

B. 229.20(b) Preemption of Inconsistent Law

1. This paragraph reflects the statutory provision that other provisions of state law that are inconsistent with federal law are preempted. Preemption does not require a determination by the Board to be effective.

C. 229.20(c) Standards for Preemption

1. This section describes the standards the Board uses in making determinations on whether federal law will preempt state laws governing funds availability. A provision of state law is considered inconsistent with federal law if it permits a depositary bank to make funds available to a customer in a longer period of time than the maximum period permitted by the Act and this regulation. For example, a state law that permits a hold of four business days or longer for local checks permits a hold that is longer than that permitted under the Act and this regulation, and therefore is inconsistent and preempted. State availability schedules that provide for availability in a shorter period of time than required under Regulation CC supersede the federal schedule.

2. Under a state law, some categories of deposits could be available for withdrawal sooner or later than the time required by this subpart, depending on the composition of the deposit. For example, the Act and this regulation (s 229.10(c)(1)(vii)) require next-day availability for the first $100 of the aggregate deposit of local or nonlocal checks on any day, and a state law could require next-day availability for any check of $100 or less that is deposited. Under the Act and this regulation, if either one $150 check or three $50 checks are deposited on a given day, $100 must be made available for withdrawal on the next business day, and $50 must be made available in accordance with the local or nonlocal schedule. Under the state law, however, the two deposits would be subject to different availability rules. In the first case, none of the proceeds of the deposit would be subject to next-day availability; in the second case, the entire proceeds of the deposit would be subject to next-day availability. In this example, because the state law would, in some situations, permit a hold longer than the maximum permitted by the Act, this provision of state law is inconsistent and preempted in its entirety.

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3. In addition to the differences between state and federal availability schedules, a number of state laws contain exceptions to the state availability schedules that are different from those provided under the Act and this regulation. The state exceptions continue to apply only in those cases where the state schedule is shorter than or equal to the federal schedule, and then only up to the limit permitted by the Regulation CC schedule. Where a deposit is subject to a state exception under a state schedule that is not preempted by Regulation CC and is also subject to a federal exception, the hold on the deposit cannot exceed the hold permissible under the federal exception in accordance with Regulation CC. In such cases, only one exception notice is required, in accordance with Sec. 229.13(g). This notice need only include the applicable federal exception as the reason the exception was invoked. For those categories of checks for which the state schedule is preempted by the federal schedule, only the federal exceptions may be used.

4. State laws that provide maximum availability periods for categories of deposits that are not covered by the Act would not be preempted. Thus, state funds availability laws that apply to funds in time and savings deposits are not affected by the Act or this regulation. In addition, the availability schedules of several states apply to 'items' deposited to an account. The term items may encompass deposits, such as nonnegotiable instruments, that are not subject to

the Regulation CC availability schedules. Deposits that are not covered by Regulation CC continue to be subject to the state availability schedules. State laws that provide maximum availability periods for categories of institutions that are not covered by the Act also would not be preempted. For example, a state law that governs money market mutual funds would not be affected by the Act or this regulation.

5. Generally, state rules governing the disclosure or notice of availability policies applicable to accounts also are preempted, if they are different from the federal rules. Nevertheless, a state law requiring disclosure of funds availability policies that apply to deposits other than 'accounts,' such as savings or time deposits, are not inconsistent with the Act and this subpart. Banks in these states would have to follow the state disclosure rules for these deposits.

D. 229.20(d) Preemption Determinations

1. The Board may issue preemption determinations upon the request of an interested party in a state. The determinations will relate only to the provisions of Subparts A and B; generally the Board will not issue individual preemption determinations regarding the relation of state U.C.C. provisions to the requirements of Subpart C.

E. 229.20(e) Procedures for Preemption Determinations

1. This provision sets forth the information that must be included in a request by an interested party for a preemption determination by the Board.

XV. Section 229.21 Civil Liability

A. 229.21(a) Civil Liability

1. This paragraph sets forth the statutory penalties for failure to comply with the requirements of this subpart. These penalties apply to provisions of state law that supersede provisions of this regulation, such as requirements that funds deposited in accounts at banks be made available more promptly than required by this regulation, but they do not apply to other provisions of state law. (See Commentary to Sec. 229.20.)

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B. 229.21(b) Class Action Awards

1. This paragraph sets forth the provision in the Act concerning the factors that should be considered by the court in establishing the amount of a class action award.

C. 229.21(c) Bona Fide Errors

1. A bank is shielded from liability under this section for a violation of a requirement of this subpart if it can demonstrate, by a preponderance of the evidence, that the violation resulted from a bona fide error and that it maintains procedures designed to avoid such errors. For example, a bank may make a bona fide error if it fails to give next-day availability on a check

drawn on the Treasury because the bank's computer system malfunctions in a way that prevents the bank from updating its customer's account; or if it fails to identify whether a payable-through check is a local or nonlocal check despite procedures designed to make this determination accurately.

D. 229.21(d) Jurisdiction

1. The Act confers subject matter jurisdiction on courts of competent jurisdiction and provides a time limit for civil actions for violations of this subpart.

E. 229.21(e) Reliance on Board Rulings

1. This provision shields banks from civil liability if they act in good faith in reliance on any rule, regulation, model form, notice, or clause (if the disclosure actually corresponds to the bank's availability policy), or interpretation of the Board, even if it were subsequently determined to be invalid. Banks may rely on this Commentary, which is issued as an official Board interpretation, as well as on the regulation itself.

F. 229.21(f) Exclusions

1. This provision clarifies that liability under this section does not apply to violations of the requirements of Subpart C of this regulation, or to actions for wrongful dishonor of a check by a paying bank's customer.

G. 229.21(g) Record Retention

1. Banks must keep records to show compliance with the requirements of this subpart for at least two years. This record retention period is extended in the case of civil actions and enforcement proceedings. Generally, a bank is not required to retain records showing that it actually has given disclosures or notices required by this subpart to each customer, but it must retain evidence demonstrating that its procedures reasonably ensure the customers' receipt of the required disclosures and notices. A bank must, however, retain a copy of each notice provided pursuant to its use of the reasonable cause exception under Sec. 229.13(g) as well as a brief description of the facts giving rise to the availability of that exception.

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XVI. Section 229.30 Paying Bank's Responsibility for Return of Checks

A. 229.30(a) Return of Checks

1. This section requires a paying bank (which, for purposes of Subpart C, may include a payable-through and payable-at bank; see Sec. 229.2(z)) that determines not to pay a check to return the check expeditiously. Generally, a check is returned expeditiously if the return process is as fast as the forward collection process. This paragraph provides two standards for expeditious

return, the 'two-day/four-day' test, and the 'forward collection' test.

2. Under the 'two-day/four-day' test, if a check is returned such that it would normally be received by the depositary bank two business days after presentment where both the paying and depositary banks are located in the same check processing region or four business days after presentment where the paying and depositary banks are not located in the same check processing region, the check is considered returned expeditiously. In certain limited cases, however, these times are shorter than the time it would normally take a forward collection check deposited in the paying bank and payable by the depositary bank to be collected. Therefore, the Board has included a 'forward collection' test, whereby a check is nonetheless considered to be returned expeditiously if the paying bank uses transportation methods and banks for return comparable to those used for forward collection checks, even if the check is not received by the depositary banks within the two-day or four-day period.

3. Two-day/four-day test.

a. Under the first test, a paying bank must return the check so that the check would normally be received by the depositary bank within specified times, depending on whether or not the paying and depositary banks are located in the same check processing region.

b. Where both banks are located in the same check processing region, a check is returned expeditiously if it is returned to the depositary bank by 4:00 p.m. (local time of the depositary bank) of the second business day after the banking day on which the check was presented to the paying bank. For example, a check presented on Monday to a paying bank must be returned to a depositary bank located in the same check processing region by 4 p.m. on Wednesday. For a paying bank that is located in a different check processing region than the depositary bank, the deadline to complete return is 4 p.m. (local time of the depositary bank) of the fourth business day after the banking day on which the check was presented to the paying bank. For example, a check presented to such a paying bank on Monday must be returned to the depositary bank by 4:00 p.m. on Friday.

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c. This two-day/four-day test does not necessarily require actual receipt of the check by the depositary bank within these times. Rather, the paying bank must send the check so that the check would normally be received by the depositary bank within the specified time. Thus, the paying bank is not responsible for unforeseeable delays in the return of the check, such as transportation delays.

d. Often, returned checks will be delivered to the depositary bank together with forward collection checks. Where the last day on which a check could be delivered to a depositary bank under this two-day/four-day test is not a banking day for the depositary bank, a returning bank might not schedule delivery of forward collection checks to the depositary bank on that day. Further, the depositary bank may not process checks on that day. Consequently, if the last day of the time limit is not a banking day for the depositary bank, the check may be delivered to the depositary bank before the close of the depositary bank's next banking day and the return will still be considered expeditious. Ordinarily, this extension of time will allow the returned checks to be delivered with the next shipment of forward collection checks destined for the depositary bank.

e. The times specified in this two-day/four-day test are based on estimated forward collection times, but take into account the particular difficulties that may be encountered in handling returned checks. It is anticipated that the normal process for forward collection of a check coupled with these return

requirements will frequently result in the return of checks before the proceeds of nonlocal checks, other than those covered by Sec. 229.10(c), must be made available for withdrawal.

f. Under this two-day/four-day test, no particular means of returning checks is required, thus providing flexibility to paying banks in selecting means of return. The Board anticipates that paying banks will often use returning banks (see Sec. 229.31) as their agents to return checks to depositary banks. A paying bank may rely on the availability schedule of the returning bank it uses in determining whether the returned check would 'normally' be returned within the required time under this two-day/four-day test, unless the paying bank has reason to believe that these schedules do not reflect the actual time for return of a check.

4. Forward collection test.

a. Under the second, 'forward collection,' test, a paying bank returns a check expeditiously if it returns a check by means as swift as the means similarly situated banks would use for the forward collection of a check drawn on the depositary bank.

b. Generally, the paying bank would satisfy the 'forward collection' test if it uses a transportation method and collection path for return comparable to that used for forward collection, provided that the returning bank selected to process the return agrees to handle the returned check under the standards for expeditious return for returning banks under Sec. 229.31(a). This test allows many paying banks a simple means of expeditious return of checks and takes into account the longer time for return that will be required by banks that do not have ready access to direct courier transportation.

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c. The paying bank's normal method of sending a check for forward collection would not be expeditious, however, if it is materially slower than that of other banks of similar size and with similar check handling activity in its community.

d. Under the 'forward collection' test, a paying bank must handle, route, and transport a returned check in a manner designed to be at least as fast as a similarly situated bank would collect a forward collection check (1) of similar amount, (2) drawn on the depositary bank, and (3) received for deposit by a branch of the paying bank or a similarly situated bank by noon on the banking day following the banking day of presentment of the returned check.

e. This test refers to similarly situated banks to indicate a general community standard. In the case of a paying bank (other than a Federal Reserve Bank), a similarly situated bank is a bank of similar asset size, in the same community, and with similar check handling activity as the paying bank. (See Sec. 229.2(ee).) A paying bank has similar check handling activity to other banks that handle similar volumes of checks for collection.

f. Under the forward collection test, banks that use means of handling returned checks that are less efficient than the means used by similarly situated banks must improve their procedures. On the other hand, a bank with highly efficient means of collecting checks drawn on a particular bank, such as a direct presentment of checks to a bank in a remote community, is not required to use that means for returned checks, i.e. direct return, if similarly situated banks do not present checks directly to that depositary bank.

5. Examples.

a. If a **check** is presented to a paying bank on Monday and the depositary bank and the paying bank are participants in the same **clearinghouse,** the paying bank should arrange to have the returned **check** received by the depositary bank by Wednesday. This would be the same day the paying bank would deliver a forward collection **check** to the depositary bank if the paying bank received the deposit

by noon on Tuesday.

b. i. If a check is presented to a paying bank on Monday and the paying bank would normally collect checks drawn on the depositary bank by sending them to a correspondent or a Federal Reserve Bank by courier, the paying bank could send the returned check to its correspondent or Federal Reserve Bank, provided that the correspondent has agreed to handle returned checks expeditiously under Sec. 229.31(a). (All Federal Reserve Banks agree to handle returned checks expeditiously.)

ii. The paying bank must deliver the returned check to the correspondent or Federal Reserve Bank by the correspondent's or Federal Reserve Bank's appropriate cut-off hour. The appropriate cut-off hour is the cut-off hour for returned checks that corresponds to the cut-off hour for forward collection checks drawn on the depositary bank that would normally be used by the paying bank or a similarly situated bank. A returned check cut-off hour corresponds to a forward collection cut-off hour if it provides for the same or faster availability for checks destined for the same depositary banks.

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iii. In this example, delivery to the correspondent or a Federal Reserve Bank by the appropriate cut-off hour satisfies the paying bank's duty, even if use of the correspondent or Federal Reserve Bank is not the most expeditious means of returning the check. Thus, a paying bank may send a local returned check to a correspondent instead of a Federal Reserve Bank, even if the correspondent then sends the returned check to a Federal Reserve Bank the following day as a qualified returned check. Where the paying bank delivers forward collection checks by courier to the correspondent or the Federal Reserve Bank, mailing returned checks to the correspondent or Federal Reserve Bank would not satisfy the forward collection test.

iv. If a paying bank ordinarily mails its forward collection checks to its correspondent or Federal Reserve Bank in order to avoid the costs of a courier delivery, but similarly situated banks use a courier to deliver forward collection checks to their correspondent or Federal Reserve Bank, the paying bank must send its returned checks by courier to meet the forward collection test.

c. If a paying bank normally sends its forward collection checks directly to the depositary bank, which is located in another community, but similarly situated banks send forward collection checks drawn on the depositary bank to a correspondent or a Federal Reserve Bank, the paying bank would not have to send returned checks directly to the depositary bank, but could send them to a correspondent or a Federal Reserve Bank.

d. The dollar amount of the returned check has a bearing on how it must be returned. If the paying bank and similarly situated banks present large-dollar checks drawn on the depositary bank directly to the depositary bank, but use a Federal Reserve Bank or a correspondent to collect small-dollar checks, generally the paying bank would be required to send its large-dollar returns directly to the depositary bank (or through a returning bank, if the checks are returned as quickly), but could use a Federal Reserve Bank or a correspondent for its small-dollar returns.

6. Choice of returning bank. In meeting the requirements of the forward collection test, the paying bank is responsible for its own actions, but not for those of the depositary bank or returning banks. (This is analogous to the responsibility of collecting banks under U.C.C. 4-202(c).) For example, if the paying bank starts the return of the check in a timely manner but return is delayed by a returning bank (including delay to create a qualified returned check), generally the paying bank has met its requirements. (See Sec. 229.38.)

If, however, the paying bank selects a returning bank that the paying bank should know is not capable of meeting its return requirements, the paying bank will not have met its obligation of exercising ordinary care in selecting intermediaries to return the check. The paying bank is free to use a method of return, other than its method of forward collection, as long as the alternate method results in delivery of the returned check to the depositary bank as quickly as the forward collection of a check drawn on the depositary bank or, where the returning bank takes a day to create a qualified returned check under Sec. 229.31(a), one day later than the forward collection time. If a paying bank returns a check on its banking day of receipt without settling for the check, as permitted under U.C.C. 4-302(a), and receives settlement for the returned check from a returning bank, it must promptly pay the amount of the check to the collecting bank from which it received the check.

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7. Qualified returned checks. Although paying banks may wish to prepare qualified returned checks because they will be handled at a lower cost by returning banks, the one business day extension provided to returning banks is not available to paying banks because of the longer time that a paying bank has to dispatch the check. Normally, paying banks will be able to convert a check to a qualified returned check at any time after the determination is made to return the check until late in the day following presentment, while a returning bank may receive returned checks late on one day and be expected to dispatch them early the next morning.

8. Routing of returned checks.

a. In effect, under either test, the paying bank acts as an agent or subagent of the depositary bank in selecting a means of return. Under Sec. 229.30(a), a paying bank is authorized to route the returned check in a variety of ways:

i. It may send the returned check directly to the depositary bank by courier or other means of delivery, bypassing returning banks; or

ii. It may send the returned check to any returning bank agreeing to handle the returned check for expeditious return to the depositary bank under Sec. 229.31(a), regardless of whether or not the returning bank handled the check for forward collection.

b. If the paying bank elects to return the check directly to the depositary bank, it is not necessarily required to return the check to the branch of first deposit. The check may be returned to the depositary bank at any location permitted under Sec. 229.32(a).

9. Midnight deadline.

a. Except for the extension permitted by Sec. 229.30(c), discussed below, this section does not relieve a paying bank from the requirement for timely return (i.e., midnight deadline) under U.C.C. 4-301 and 4-302, which continue to apply. Under U.C.C. 4-302, a paying bank is 'accountable' for the amount of a demand item, other than a documentary draft, if it does not pay or return the item or send notice of dishonor by its midnight deadline. Under U.C.C. 3-418(c) and 4-215(a), late return constitutes payment and would be final in favor of a holder in due course or a person who has in good faith changed his position in reliance on the payment. Thus, retaining this requirement gives the paying bank an additional incentive to make a prompt return.

b. The expeditious return requirement applies to a paying bank that determines not to pay a check. This requirement applies to a payable-through or a payable-at bank that is defined as a paying bank (see Sec. 229.2(z)) and that returns a check. This requirement begins when the payable-through or payable-at bank receives the check during forward collection, not when the payor returns the check to the payable-through or payable-at bank. Nevertheless, a check sent

for payment or collection to a payable-through or payable-at bank is not considered to be drawn on that bank for purposes of the midnight deadline provision of U.C.C. 4-301. (See discussion of Sec. 229.36(a).)

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c. The liability section of this subpart (s 229.38) provides that a paying bank is not subject to both 'accountability' for missing the midnight deadline under the U.C.C. and liability for missing the timeliness requirements of this regulation. Also, a paying bank is not responsible for failure to make expeditious return to a party that has breached a presentment warranty under U.C.C. 4-208, notwithstanding that the paying bank has returned the check. (See Commentary to Sec. 229.33(a).)

10. U.C.C. provisions affected. This paragraph directly affects the following provisions of the U.C.C., and may affect other sections or provisions:

a. Section 4-301(d), in that instead of returning a **check** through a **clearinghouse** or to the presenting bank, a paying bank may send a returned **check** to the depositary bank or to a returning bank.

b. Section 4-301(a), in that time limits specified in that section may be affected by the additional requirement to make an expeditious return and in that settlement for returned checks is made under Sec. 229.31(c), not by revocation of settlement.

B. 229.30(b) Unidentifiable Depositary Bank

1. In some cases, a paying bank will be unable to identify the depositary bank through the use of ordinary care and good faith. The Board expects that these cases will be unusual as skilled return clerks will readily identify the depositary bank from the depositary bank **indorsement** required under Sec. 229.35 and Appendix D. In cases where the paying bank is unable to identify the depositary bank, the paying bank may, in accordance with Sec. 229.30(a), send the returned **check** to a returning bank that agrees to handle the returned **check** for expeditious return to the depositary bank under Sec. 229.31(a). The returning bank may be better able to identify the depositary bank.

2. In the alternative, the paying bank may send the **check** back up the path used for forward collection of the **check.** The presenting bank and prior collecting banks normally will be able to trace the collection path of the **check** through the use of their internal records in conjunction with the **indorsements** on the returned **check.** In these limited cases, the paying bank may send such a returned **check** to any bank that handled the **check** for forward collection, even if that bank does not agree to handle the returned **check** for expeditious return to the depositary bank under Sec. 229.31(a). A paying bank returning a **check** under this paragraph to a bank that has not agreed to handle the **check** expeditiously must advise that bank that it is unable to identify the depositary bank. This advice must be conspicuous, such as a stamp on each **check** for which the depositary bank is unknown if such **checks** are commingled with other returned **checks,** or, if such **checks** are sent in a separate cash letter, by one notice on the cash letter. This information will warn the bank that this **check** will require special research and handling in accordance with Sec. 229.31(b). The returned **check** may not be prepared for automated return. The return of a **check** to a bank that handled the **check** for forward collection is consistent with Sec. 229.35(b), which requires a bank handling a **check** to take up the **check** it is has not been paid.

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3. The sending of a **check** to a bank that handled the **check** for forward

collection under this paragraph is not subject to the requirements for expeditious return by the paying bank. Often, the paying bank will not have courier or other expeditious means of transportation to the collecting or presenting bank. Although the lack of a requirement of expeditious return will create risks for the depositary bank, in many cases the inability to identify the depositary bank will be due to the depositary bank's, or a collecting bank's, failure to use the **indorsement** required by Sec. 229.35(a) and Appendix D. If the depositary bank failed to use the proper **indorsement,** it should bear the risks of less than expeditious return. Similarly, where the inability to identify the depositary bank is due to **indorsements** or other information placed on the back of the **check** by the depositary bank's customer or other prior **indorser,** the depositary bank should bear the risk that it cannot charge a returned **check** back to that customer. Where the inability to identify the depositary bank is due to subsequent **indorsements** of collecting banks, these collecting banks may be liable for a loss incurred by the depositary bank due to less than expeditious return of a **check**; those banks therefore have an incentive to return **checks** sent to them under this paragraph quickly.

4. This paragraph does not relieve a paying bank from the liability for the lack of expeditious return in cases where the paying bank is itself responsible for the inability to identify the depositary bank, such as when the paying bank's customer has used a **check** with printing or other material on the back in the area reserved for the depositary bank's **indorsement,** making the **indorsement** unreadable. (See Sec. 229.38(d).)

5. A paying bank's return under this paragraph is also subject to its midnight deadline under U.C.C. 4-301, Regulation J (if the check is returned through a Federal Reserve Bank), and the exception provided in Sec. 229.30(c). A paying bank also may send a check to a prior collecting bank to make a claim against that bank under Sec. 229.35(b) where the depositary bank is insolvent or in other cases as provided in Sec. 229.35(b). Finally, a paying bank may make a claim against a prior collecting bank based on a breach of warranty under U.C.C. 4-208.

C. 229.30(c) Extension of Deadline

1. This paragraph permits extension of the deadlines for returning a check for which the paying bank previously has settled (generally midnight of the banking day following the banking day on which the check is received by the paying bank) and for returning a check without settling for it (generally midnight of the banking day on which the check is received by the paying bank, or such other time provided by Sec. 210.9 of Regulation J (12 CFR part 210) or Sec. 229.36(f)(2) of this part), but not of the duty of expeditious return, in two circumstances:

a. A paying bank may have a courier that leaves after midnight (or after any other applicable deadline) to deliver its forward collection checks. This paragraph removes the constraint of the deadline for returned checks if the returned check reaches either the depositary bank or the returning bank to which it is sent on that bank's banking day following the expiration of the applicable deadline. The extension also applies if the check reaches the bank to which it is sent later than the close of that bank's banking day, if highly expeditious means of transportation are used. For example, a West Coast paying bank may use this further extension to ship a returned check by air courier directly to an East Coast depositary bank even if the check arrives after the close of the depositary bank's banking day.

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b. A paying bank may observe a banking day, as defined in the applicable U.C.C., on a Saturday, which is not a business day and therefore not a banking day under Regulation CC. In such a case, the U.C.C. deadline for returning checks received and settled for on Friday, or for returning checks received on Saturday without settling for them, might require the bank to return the checks by midnight Saturday. However, the bank may not have couriers leaving on Saturday to carry returned checks, and even if it did, the returning or depositary bank to which the returned checks were sent might not be open until Sunday night or Monday morning to receive and process the checks. This paragraph extends the midnight deadline if the returned checks reach the returning bank by a cut-off hour (usually on Sunday night or Monday morning) that permits processing during its next processing cycle or reach the depositary bank by the cut-off hour on its next banking day following the Saturday midnight deadline.

2. The time limits that are extended in each case are the paying bank's midnight deadline for returning a check for which it has already settled and the paying bank's deadline for returning a check without settling for it in U.C.C. 4-301 and 4-302, ss 210.9 and 210.12 of Regulation J (12 CFR 210.9 and 210.12), and Sec. 229.36(f)(2) of this part. As these extensions are designed to speed (s 229.30(c)(1)), or at least not slow (s 229.30(c)(2)), the overall return of checks, no modification or extension of the expeditious return requirements in Sec. 229.30(a) is required.

3. The paying bank satisfies its midnight or other return deadline by dispatching returned checks to another bank by courier, including a courier under contract with the paying bank, prior to expiration of the deadline.

4. This paragraph directly affects U.C.C. 4-301 and 4-302 and ss 210.9 and 210.12 of Regulation J (12 CFR 210.9 and 210.12) to the extent that this paragraph applies by its terms, and may affect other provisions.

D. 229.30(d) Identification of Returned Check

1. Most paying banks currently use some form of stamp on a returned check indicating the reason for return. This paragraph makes this practice mandatory. No particular form of stamp is required, but the stamp must indicate the reason for return. A check is identified as a returned check by a reason for return stamp, even though the stamp does not specifically state that the check is a returned check. A reason such as 'Refer to Maker' is permissible in appropriate cases. If the paying bank places the returned check in a carrier envelope, the carrier envelope should indicate that it is a returned check, but need not repeat the reason for return stated in the check if it in fact appears on the check.

E. 229.30(e) Depositary Bank Without Accounts

1. Subpart B of this regulation applies only to **'checks'** deposited in transaction-type 'accounts.' Thus, a depositary bank with only time or savings accounts need not comply with the availability requirements of Subpart B. Collecting banks will not have couriers delivering **checks** to these banks as paying banks, because no **checks** are drawn on them. Consequently, the costs of using a courier or other expedited means to deliver returned **checks** directly to such a depositary bank may not be justified. Thus, the expedited return requirement of Sec. 229.30(a) and the notice of nonpayment requirement of Sec. 229.33 do not apply to **checks** being returned to banks that do not hold accounts. The paying bank's midnight deadline in U.C.C. 4-301 and 4-302 and Sec. 210.12 of Regulation J (12 CFR 210.12) would continue to apply to these **checks.**

Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands

1. The Act and regulation provide an extension of the availability schedules for check deposits at a branch of a bank if the branch is located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands. The schedules for local checks, nonlocal checks (including nonlocal checks subject to the reduced schedules of Appendix B), and deposits at nonproprietary ATMs are extended by one business day for checks deposited to accounts in banks located in these jurisdictions that are drawn on or payable at or through a paying bank not located in the same jurisdiction as the depositary bank. For example, a check deposited in a bank in Hawaii and drawn on a San Francisco paying bank must be made available for withdrawal not later than the third business day following deposit. This extension does not apply to deposits that must be made available for withdrawal on the next business day.

2. The Congress did not provide this extension of the schedules to checks drawn on a paying bank located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands and deposited in an account at a depositary bank in the 48 contiguous states. Therefore, a check deposited in a San Francisco bank drawn on a Hawaii paying bank must be made available for withdrawal not later than the second rather than the third business day following deposit.

F. 229.12(f) Deposits at Nonproprietary ATMs

1. The Act and regulation provide a special rule for deposits made at nonproprietary ATMs. This paragraph does not apply to deposits made at proprietary ATMs. All deposits at a nonproprietary ATM must be made available for withdrawal by the fifth business day following the banking day of deposit. For example, a deposit made at a nonproprietary ATM on a Monday, including any deposit by cash or checks that would otherwise be subject to next-day (or second-day) availability, must be made available for withdrawal not later than Monday of the following week. The provisions of Sec. 229.10(c)(1)(vii) requiring a depositary bank to make up to $100 of an aggregate daily deposit available for withdrawal on the first business day after the banking day of deposit do not apply to deposits at a nonproprietary ATM.

VII. Section 229.13 Exceptions

A. Introduction

1. While certain safeguard exceptions (such as those for new accounts and checks the bank has reasonable cause to believe are uncollectible) are established in the Act, the Congress gave the Board the discretion to determine whether certain other exceptions should be included in its regulations. Specifically, the Act gives the Board the authority to establish exceptions to the schedules for large or redeposited checks and for accounts that have been repeatedly overdrawn. These exceptions apply to local and nonlocal checks as well as to checks that must otherwise be accorded next-day (or second-day) availability under Sec. 229.10(c).

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2. Many checks will not be returned to the depositary bank by the time funds must be made available for withdrawal under the next-day (or second-day), local, and nonlocal schedules. In order to reduce risk to depositary banks, the Board

has exercised its statutory authority to adopt these exceptions to the schedules in the regulation to allow the depositary bank to extend the time within which it is required to make funds available.

3. The Act also gives the Board the authority to suspend the schedules for any classification of checks, if the schedules result in an unacceptable level of fraud losses. The Board will adopt regulations or issue orders to implement this statutory authority if and when circumstances requiring its implementation arise.

B. 229.13(a) New Accounts

1. Definition of New Account.

a. The Act provides an exception to the availability schedule for new accounts. An account is defined as a new account during the first 30 calendar days after the account is opened. An account is opened when the first deposit is made to the account. An account is not considered a new account, however, if each customer on the account has a transaction account relationship with the depositary bank, including a dormant account, that is at least 30 calendar days old or if each customer has had an established transaction account with the depositary bank within the 30 calendar days prior to opening the second account.

b. The following are examples of what constitutes, and does not constitute, a new account:

i. If the customer has an established account with a bank and opens a second account with the bank, the second account is not subject to the new account exception.

ii. If a customer's account were closed and another account opened as a successor to the original account (due, for example, to the theft of checks or a debit card used to access the original account), the successor account is not subject to the new account exception, assuming the previous account relationship is at least 30 days old. Similarly, if a customer closes an established account and opens a separate account within 30 days, the new account is not subject to the new account exception.

iii. If a customer has a savings deposit or other deposit that is not an account (as that term is defined in Sec. 229.2(a)) at the bank, and opens an account, the account is subject to the new account exception.

iv. If a person that is authorized to sign on a corporate account (but has no other relationship with the bank) opens a personal account, the personal account is subject to the new account exception.

v. If a customer has an established joint account at a bank, and subsequently opens an individual account with that bank, the individual account is not subject to the new account exception.

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vi. If two customers that each have an established individual account with the bank open a joint account, the joint account is not subject to the new account exception. If one of the customers on the account has no current or recent established account relationship with the bank, however, the joint account is subject to the new account exception, even if the other individual on the account has an established account relationship with the bank.

2. Rules Applicable to New Accounts.

a. During the new account exception period, the schedules for local and nonlocal checks do not apply, and, unlike the other exceptions provided in this section, the regulation provides no maximum time frames within which the proceeds of these deposits must be made available for withdrawal. Maximum times within which funds must be available for withdrawal during the new account

period are provided, however, for certain other deposits. Deposits received by cash and electronic payments must be made available for withdrawal in accordance with Sec. 229.10.

b. Special rules also apply to deposits of Treasury checks, U.S. Postal Service money orders, checks drawn on Federal Reserve Banks and Federal Home Loan Banks, state and local government checks, cashier's checks, certified checks, teller's checks, and, for the purposes of the new account exception only, traveler's checks. The first $5,000 of funds deposited to a new account on any one banking day by these check deposits must be made available for withdrawal in accordance with Sec. 229.10(c). Thus, the first $5,000 of the proceeds of these check deposits must be made available on the first business day following deposit, if the deposit is made in person to an employee of the depositary bank and the other conditions of next-day availability are met. Funds must be made available on the second business day after deposit for deposits that are not made over the counter, in accordance with Sec. 229.10(c)(2). (Proceeds of Treasury check deposits must be made available on the first business day after deposit, even if the check is not deposited in person to an employee of the depositary bank.) Funds in excess of the first $5,000 deposited by these types of checks on a banking day must be available for withdrawal not later than the ninth business day following the banking day of deposit. The requirements of Sec. 229.10(c)(1)(vi) and (vii) that 'on us' checks and the first $100 of a day's deposit be made available for withdrawal on the next business day do not apply during the new account period.

3. Representation by Customer. The depositary bank may rely on the representation of the customer that the customer has no established account relationship with the bank, and has not had any such account relationship within the past 30 days, to determine whether an account is subject to the new account exception.

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C. 229.13(b) Large Deposits

1. Under the large deposit exception, a depositary bank may extend the hold placed on check deposits to the extent that the amount of the aggregate deposit on any banking day exceeds $5,000. This exception applies to local and nonlocal checks, as well as to checks that otherwise would be made available on the next (or second) business day after the day of deposit under Sec. 229.10(c). Although the first $5,000 of a day's deposit is subject to the availability otherwise provided for checks, the amount in excess of $5,000 may be held for an additional period of time as provided in Sec. 229.13(h). When the large deposit exception is applied to deposits composed of a mix of checks that would otherwise be subject to differing availability schedules, the depositary bank has the discretion to choose the portion of the deposit to which it applies the exception. Deposits by cash or electronic payment are not subject to this exception for large deposits.

2. The following example illustrates the operation of the large deposit exception. If a customer deposits $2,000 in cash and a $9,000 local check on a Monday, $2,100 (the proceeds of the cash deposit and $100 from the local check deposit) must be made available for withdrawal on Tuesday. An additional $4,900 of the proceeds of the local check must be available for withdrawal on Wednesday in accordance with the local schedule, and the remaining $4,000 may be held for an additional period of time under the large deposit exception.

3. Where a customer has multiple accounts with a depositary bank, the bank may apply the large deposit exception to the aggregate deposits to all of the customer's accounts, even if the customer is not the sole holder of the accounts and not all of the holders of the customer's accounts are the same. Thus, a depositary bank may aggregate the deposits made to two individual accounts in the same name, to an individual and a joint account with one common name, or to two joint accounts with at least one common name for the purpose of applying the large deposit exception. Aggregation of deposits to multiple accounts is permitted because the Board believes that the risk to the depositary bank associated with large deposits is similar regardless of how the deposits are allocated among the customer's accounts.

D. 229.13(c) Redeposited Checks

1. The Act gives the Board the authority to promulgate an exception to the schedule for checks that have been returned unpaid and redeposited. Section 229.13(c) provides such an exception for checks that have been returned unpaid and redeposited by the customer or the depositary bank. This exception applies to local and nonlocal checks, as well as to checks that would otherwise be made available on the next (or second) business day after the day of deposit under Sec. 229.10(c).

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2. This exception addresses the increased risk to the depositary bank that **checks** that have been returned once will be uncollectible when they are presented to the paying bank a second time. The Board, however, does not believe that this increased risk is present for **checks** that have been returned due to a missing **indorsement.** Thus, the exception does not apply to **checks** returned unpaid due to missing **indorsements** and redeposited after the missing **indorsement** has been obtained, if the reason for return indicated on the **check** (see Sec. 229.30(d)) states that it was returned due to a missing **indorsement.** For the same reason, this exception does not apply to a **check** returned because it was postdated (future dated), if the reason for return indicated on the **check** states that it was returned because it was postdated, and if it is no longer postdated when redeposited.

3. To determine when funds must be made available for withdrawal, the banking day on which the check is redeposited is considered to be the day of deposit. A depositary bank that made $100 of a check available for withdrawal under Sec. 229.10(c)(1)(vii) can charge back the full amount of the check, including the $100, if the check is returned unpaid, and the $100 need not be made available again if the check is redeposited.

E. 229.13(d) Repeated Overdrafts

1. The Act gives the Board the authority to establish an exception for 'deposit accounts which have been overdrawn repeatedly.' This paragraph provides two tests to determine what constitutes repeated overdrafts. Under the first test, a customer's accounts are considered repeatedly overdrawn if, on six banking days within the preceding six months, the available balance in any account held by the customer is negative, or the balance would have become negative if checks or other charges to the account had been paid, rather than returned. This test can be met based on separate occurrences (e.g., checks that are returned for insufficient funds on six different days), or based on one occurrence (e.g., a negative balance that remains on the customer's account for six banking days). If the bank dishonors a check that otherwise would have

created a negative balance, however, the incident is considered an overdraft only on that day.

2. The second test addresses substantial overdrafts. Such overdrafts increase the risk to the depositary bank of dealing with the repeated overdrafter. Under this test, a customer incurs repeated overdrafts if, on two banking days within the preceding six months, the available balance in any account held by the customer is negative in an amount of $5,000 or more, or would have become negative in an amount of $5,000 or more if checks or other charges to the account had been paid.

3. The exception relates not only to overdrafts caused by checks drawn on the account, but also overdrafts caused by other debit charges (e.g. ACH debits, point-of-sale transactions, returned checks, account fees, etc.). If the potential debit is in excess of available funds, the exception applies regardless of whether the items were paid or returned unpaid. An overdraft resulting from an error on the part of the depositary bank, or from the imposition of overdraft charges for which the customer is entitled to a refund under ss 229.13(e) or 229.16(c), cannot be considered in determining whether the customer is a repeated overdrafter. The exception excludes accounts with overdraft lines of credit, unless the credit line has been exceeded or would have been exceeded if the checks or other charges to the account had been paid.

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4. This exception applies to local and nonlocal checks, as well as to checks that otherwise would be made available on the next (or second) business day after the day of deposit under Sec. 229.10(c). When a bank places or extends a hold under this exception, it need not make the first $100 of a deposit available for withdrawal on the next business day, as otherwise would be required by Sec. 229.10(c)(1)(vii).

F. 229.13(e) Reasonable Cause To Doubt Collectibility

1. In the case of certain check deposits, if the bank has reasonable cause to believe the check is uncollectible, it may extend the time funds must be made available for withdrawal. This exception applies to local and nonlocal checks, as well as to checks that would otherwise be made available on the next (or second) business day after the day of deposit under Sec. 229.10(c). When a bank places or extends a hold under this exception, it need not make the first $100 of a deposit available for withdrawal on the next business day, as otherwise would be required by Sec. 229.10(c)(1)(vii). If the reasonable cause exception is invoked, the bank must include in the notice to its customer, required by Sec. 229.13(g), the reason that the bank believes that the check is uncollectible.

2. The following are several examples of circumstances under which the reasonable cause exception may be invoked:

a. If a bank received a notice from the paying bank that a check was not paid and is being returned to the depositary bank, the depositary bank could place a hold on the check or extend a hold previously placed on that check, and notify the customer that the bank had received notice that the check is being returned. The exception could be invoked even if the notice were incomplete, if the bank had reasonable cause to believe that the notice applied to that particular check.

b. The depositary bank may have received information from the paying bank, prior to the presentment of the check, that gives the bank reasonable cause to believe that the check is uncollectible. For example, the paying bank may have indicated that payment has been stopped on the check, or that the drawer's

account does not currently have sufficient funds to honor the check. Such information may provide sufficient basis to invoke this exception. In these cases, the depositary bank could invoke the exception and disclose as the reason the exception is being invoked the fact that information from the paying bank indicates that the check may not be paid.

c. The fact that a check is deposited more than six months after the date on the check (i.e. a stale check) is a reasonable indication that the check may be uncollectible, because under U.C.C. 4-404 a bank has no duty to its customer to pay a check that is more than six months old. Similarly, if a check being deposited is postdated (future dated), the bank may have a reasonable cause to believe the check is uncollectible, because the check may not be properly payable under U.C.C. 4-401. The bank, in its notice, should specify that the check is stale-dated or postdated.

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d. There are reasons that may cause a bank to believe that a check is uncollectible that are based on confidential information. For example, a bank could conclude that a check being deposited is uncollectible based on its reasonable belief that the depositor is engaging in kiting activity. Reasonable belief as to the insolvency or pending insolvency of the drawer of the check or the drawee bank and that the checks will not be paid also may justify invoking this exception. In these cases, the bank may indicate, as the reason it is invoking the exception, that the bank has confidential information that indicates that the check might not be paid.

3. The Board has included a reasonable cause exception notice as a model notice in Appendix C (C-13). The model notice includes several reasons for which this exception may be invoked. The Board does not intend to provide a comprehensive list of reasons for which this exception may be invoked; another reason that does not appear on the model notice may be used as the basis for extending a hold, if the reason satisfies the conditions for invoking this exception. A depositary bank may invoke the reasonable cause exception based on a combination of factors that give rise to a reasonable cause to doubt the collectibility of a check. In these cases, the bank should disclose the primary reasons for which the exception was invoked in accordance with paragraph (g) of this section.

4. The regulation provides that the determination that a check is uncollectible shall not be based on a class of checks or persons. For example, a depositary bank cannot invoke this exception simply because the check is drawn on a paying bank in a rural area and the depositary bank knows it will not have the opportunity to learn of nonpayment of that check before funds must be made available under the availability schedules. Similarly, a depositary bank cannot invoke the reasonable cause exception based on the race or national origin of the depositor.

5. If a depositary bank invokes this exception with respect to a particular check and does not provide a written notice to the depositor at the time of deposit, the depositary bank may not assess any overdraft fee (such as an 'NSF' charge) or charge interest for use of overdraft credit, if the check is paid by the paying bank and these charges would not have occurred had the exception not been invoked. A bank may assess an overdraft fee under these circumstances, however, if it provides notice to the customer, in the notice of exception required by paragraph (g) of this section, that the fee may be subject to refund, and refunds the charges upon the request of the customer. The notice must state that the customer may be entitled to a refund of any overdraft fees that are assessed if the check being held is paid, and indicate where such requests for a refund of overdraft fees should be directed.

G. 229.13(f) Emergency Conditions

1. Certain emergency conditions may arise that delay the collection or return of checks, or delay the processing and updating of customer accounts. In the circumstances specified in this paragraph, the depositary bank may extend the holds that are placed on deposits of checks that are affected by such delays, if the bank exercises such diligence as the circumstances require. For example, if a bank learns that a check has been delayed in the process of collection due to severe weather conditions or other causes beyond its control, an emergency condition covered by this section may exist and the bank may place a hold on the check to reflect the delay. This exception applies to local and nonlocal checks, as well as checks that would otherwise be made available on the next (or second) business day after the day of deposit under Sec. 229.10(c). When a bank places or extends a hold under this exception, it need not make the first $100 of a deposit available for withdrawal on the next business day, as otherwise would be required by Sec. 229.10(c)(1)(vii). In cases where the emergency conditions exception does not apply, as in the case of deposits of cash or electronic payments under Sec. 229.10 (a) and (b), the depositary bank may not be liable for a delay in making funds available for withdrawal if the delay is due to a bona fide error such as an unavoidable computer malfunction.

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H. 229.13(g) Notice of Exception

1. In general.

a. If a depositary bank invokes any of the safeguard exceptions to the schedules listed above, other than the new account exception, and extends the hold on a deposit beyond the time periods permitted in ss 229.10(c) and 229.12, it must provide a notice to its customer. Except in the cases described in paragraphs (g)(2) and (g)(3) of this section, notices must be given each time an exception hold is invoked and must state the customer's account number, the date of deposit, the reason the exception was invoked, and the time period within which funds will be available for withdrawal.

b. With respect to paragraph (g)(1), the requirement that the notice state the time period within which the funds shall be made available may be satisfied if the notice identifies the date the deposit is received and information sufficient to indicate when funds will be available and the amounts that will be available at those times. For example, for a deposit involving more than one check, the bank need not provide a notice that discloses when funds from each individual check in the deposit will be available for withdrawal; instead, the bank may provide a total dollar amount for each of the time periods when funds will be available, or provide the customer with an explanation of how to determine the amount of the deposit that will be held and when the funds will be available for deposit. Appendix C (C-12) contains a model notice.

c. For deposits made in person to an employee of the depositary bank, the notice generally must be given to the person making the deposit, i.e., the 'depositor', at the time of deposit. The depositor need not be the customer holding the account. For other deposits, such as deposits received at an ATM, lobby deposit box, night depository, or through the mail, notice must be mailed to the customer not later than the close of the business day following the banking day on which the deposit was made.

d. Notice to the customer also may be provided at a later time, if the facts upon which the determination to invoke the exception do not become known to the depositary bank until after notice would otherwise have to be given. In these cases, the bank must mail the notice to the customer as soon as practicable, but not later than the business day following the day the facts become known. A bank is deemed to have knowledge when the facts are brought to the attention of the person or persons in the bank responsible for making the determination, or when the facts would have been brought to their attention if the bank had exercised due diligence.

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e. If the depositary bank extends the hold placed on a deposit due to an emergency condition, the notice requirement generally applies; however, the regulation provides that the bank need not provide a notice if the funds would be available for withdrawal before the notice must be sent. For example, if on the last day of a hold period the depositary bank experiences a computer failure and customer accounts cannot be updated in a timely fashion to reflect the funds as available balances, notices are not required if the funds are made available before the notices must be sent.

f. In those cases described in paragraphs (g)(2) and (g)(3), the depositary bank need not provide a notice every time an exception hold is applied to a deposit. When paragraph (g)(2) or (g)(3) requires disclosure of the time period within which deposits subject to the exception generally will be available for withdrawal, the requirement may be satisfied if the one-time notice states when 'on us,' local, and nonlocal checks will be available for withdrawal if an exception is invoked.

2. One-time exception notice.

a. Under paragraph (g)(2), if a nonconsumer account (see Commentary to Sec. 229.2(n)) is subject to the large deposit or redeposited check exception, the depositary bank may give its customer a single notice at or prior to the time notice must be provided under paragraph (g)(1). Notices provided under paragraph (g)(2) must contain the reason the exception may be invoked and the time period within which deposits subject to the exception will be available for withdrawal (see Model Notice C-14). A depositary bank may provide a one-time notice to a nonconsumer customer under paragraph (g)(2) only if each exception cited in the notice (the large deposit and/or the redeposited check exception) will be invoked for most check deposits to the customer's account to which the exception could apply. A one-time notice may state that the depositary bank will apply exception holds to certain subsets of deposits to which the large deposit or redeposited check exception may apply, and the notice should identify such subsets. For example, the depositary bank may apply the redeposited check exception only to checks that were redeposited automatically by the depositary bank in accordance with an agreement with the customer, rather than to all redeposited checks. In lieu of sending the one-time notice, a depositary bank may send individual hold notices for each deposit subject to the large deposit or redeposited check exception in accordance with Sec. 229.13(g)(1) (see Model Notice C-12).

b. In the case of a deposit of multiple checks, the depositary bank has the discretion to place an exception hold on any combination of checks in excess of $5,000. The notice should enable a customer to determine the availability of the deposit in the case of a deposit of multiple checks. For example, if a customer deposits a $5,000 local check and a $5,000 nonlocal check, under the large deposit exception, the depositary bank may make funds available in the amount of (1) $100 on the first business day after deposit, $4,900 on the second business day after deposit (local check), and $5,000 on the eleventh business

day after deposit (nonlocal check with 6-day exception hold), or (2) $100 on the first business day after deposit, $4,900 on the fifth business day after deposit (nonlocal check), and $5,000 on the seventh business day after deposit (local check with 5-day exception hold). The notice should reflect the bank's priorities in placing exception holds on next-day (or second-day), local, and nonlocal checks.

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3. Notice of repeated overdraft exception. Under paragraph (g)(3), if an account is subject to the repeated overdraft exception, the depositary bank may provide one notice to its customer for each time period during which the exception will apply. Notices sent pursuant to paragraph (g)(3) must state the customer's account number, the fact the exception was invoked under the repeated overdraft exception, the time period within which deposits subject to the exception will be made available for withdrawal, and the time period during which the exception will apply (see Model Notice C-15). A depositary bank may provide a one-time notice to a customer under paragraph (g)(3) only if the repeated overdraft exception will be invoked for most check deposits to the customer's account.

4. Record retention. A depositary bank must retain a record of each notice of a reasonable cause exception for a period of two years, or such longer time as provided in the record retention requirements of Sec. 229.21. This record must contain a brief description of the facts on which the depositary bank based its judgment that there was reasonable cause to doubt the collectibility of a check. In many cases, such as where the exception was invoked on the basis of a notice of nonpayment received, the record requirement may be met by retaining a copy of the notice sent to the customer. In other cases, such as where the exception was invoked on the basis of confidential information, a further description to the facts, such as insolvency of drawer, should be included in the record.

I. 229.13(h) Availability of Deposits Subject to Exceptions

1. If a depositary bank invokes any exception other than the new account exception, the bank may extend the time within which funds must be made available under the schedule by a reasonable period of time. This provision establishes that an extension of up to one business day for 'on us' checks, five business days for local checks, and six business days for nonlocal checks is reasonable. Under certain circumstances, however, a longer extension of the schedules may be reasonable. In these cases, the burden is placed on the depositary bank to establish that a longer period is reasonable.

2. For example, assume a bank extended the hold on a local check deposit by five business days based on its reasonable cause to believe that the check is uncollectible. If, on the day before the extended hold is scheduled to expire, the bank receives a notification from the paying bank that the check is being returned unpaid, the bank may determine that a longer hold is warranted, if it decides not to charge back the customer's account based on the notification. If the bank decides to extend the hold, the bank must send a second notice, in accordance with paragraph (g) of this section, indicating the new date that the funds will be available for withdrawal.

3. With respect to Treasury checks, U.S. Postal Service money orders, checks drawn on Federal Reserve Banks or Federal Home Loan Banks, state and local government checks, cashier's checks, certified checks, and teller's checks subject to the next-day (or second-day) availability requirement, the depositary bank may extend the time funds must be made available for withdrawal under the

large deposit, redeposited check, repeated overdraft, or reasonable cause exception by a reasonable period beyond the delay that would have been permitted under the regulation had the checks not been subject to the next-day (or second-day) availability requirement. The additional hold is added to the local or nonlocal schedule that would apply based on the location of the paying bank.

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4. One business day for 'on us' checks, five business days for local checks, and six business days for nonlocal checks, in addition to the time period provided in the schedule, should provide adequate time for the depositary bank to learn of the nonpayment of virtually all checks that are returned. For example, if a customer deposits a $7,000 cashier's check drawn on a nonlocal bank, and the depositary bank applies the large deposit exception to that check, $5,000 must be available for withdrawal on the first business day after the day of deposit and the remaining $2,000 must be available for withdrawal on the eleventh business day following the day of deposit (six business days added to the five-day schedule for nonlocal checks), unless the depositary bank establishes that a longer hold is reasonable.

5. In the case of the application of the emergency conditions exception, the depositary bank may extend the hold placed on a check by not more than a reasonable period following the end of the emergency or the time funds must be available for withdrawal under ss 229.10(c) or 229.12, whichever is later.

6. This provision does not apply to holds imposed under the new account exception. Under that exception, the maximum time period within which funds must be made available for withdrawal is specified for deposits that generally must be accorded next-day availability under Sec. 229.10. This subpart does not specify the maximum time period within which the proceeds of local and nonlocal checks must be made available for withdrawal during the new account period.

VIII. Section 229.14 Payment of Interest

A. 229.14(a) In General

1. This section requires that a depositary bank begin accruing interest on interest-bearing accounts not later than the day on which the depositary bank receives credit for the funds deposited.3 A depositary bank generally receives credit on checks within one or two days following deposit. A bank receives credit on a cash deposit, an electronic payment, and the deposit of a check that is drawn on the depositary bank itself on the day the cash, electronic payment, or check is received. In the case of a deposit at a nonproprietary ATM, credit generally is received on the day the bank that operates the ATM credits the depositary bank for the amount of the deposit.

3 This section implements section 606 of the Act (12 U.S.C. 4005). The Act keys the requirement to pay interest to the time the depositary bank receives provisional credit for a check. Provisional credit is a term used in the U.C.C. that is derived from the Code's concept of provisional settlement. (See U.C.C. 4-214 and 4-215.) Provisional credit is credit that is subject to charge-back if the check is returned unpaid; once the check is finally paid, the right to charge back expires and the provisional credit becomes final. Under Subpart C, a paying bank no longer has an automatic right to charge back credits given in settlement of a check, and the concept of provisional settlement is no longer useful and has been eliminated by the regulation. Accordingly, this section uses

the term credit rather than provisional credit, and this section applies regardless of whether a credit would be provisional or final under the U.C.C. Credit does not include a bookkeeping entry (sometimes referred to as deferred credit) that does not represent funds actually available for the bank's use.

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2. Because account includes only transaction accounts, other interest-bearing accounts of the depositary bank, such as money market deposit accounts, savings deposits, and time deposits, are not subject to this requirement; however, a bank may accrue interest on such deposits in the same way that it accrues interest under this paragraph for simplicity of operation. The Board intends the term interest to refer to payments to or for the account of any customer as compensation for the use of funds, but to exclude the absorption of expenses incident to providing a normal banking function or a bank's forbearance from charging a fee in connection with such a service. (See 12 CFR 217.2(d).) Thus, earnings credits often applied to corporate accounts are not interest payments for the purposes of this section.

3. It may be difficult for a depositary bank to track which day the depositary bank receives credit for specific checks in order to accrue interest properly on the account to which the check is deposited. This difficulty may be pronounced if the bank uses different means of collecting checks based on the time of day the check is received, the dollar amount of the check, and/or the paying bank to which it must be sent. Thus, for the purpose of the interest accrual requirement, a bank may rely on an availability schedule from its Federal Reserve Bank, Federal Home Loan Bank, or correspondent to determine when the depositary bank receives credit. If availability is delayed beyond that specified in the availability schedule, a bank may charge back interest erroneously accrued or paid on the basis of that schedule.

4. This paragraph also permits a depositary bank to accrue interest on checks deposited to all of its interest-bearing accounts based on when the bank receives credit on all checks sent for payment or collection. For example, if a bank receives credit on 20 percent of the funds deposited in the bank by check as of the business day of deposit (e.g., 'on us' checks), 70 percent as of the business day following deposit, and 10 percent on the second business day following deposit, the bank can apply these percentages to determine the day interest must begin to accrue on check deposits to all interest-bearing accounts, regardless of when the bank received credit on the funds deposited in any particular account. Thus, a bank may begin accruing interest on a uniform basis for all interest-bearing accounts, without the need to track the type of check deposited to each account.

5. This section is not intended to limit a policy of a depositary bank that provides that interest accrues only on balances that exceed a specified amount, or on the minimum balance maintained in the account during a given period, provided that the balance is determined based on the date that the depositary bank receives credit for the funds. This section also is not intended to limit any policy providing that interest accrues sooner than required by this paragraph.

B. 229.14(b) Special Rule for Credit Unions

1. This provision implements a requirement in section 606(b) of the Act, and provides an exemption from the payment-of-interest requirements for credit unions that do not begin to accrue interest or dividends on their customer

accounts until a later date than the day the credit union receives credit for those deposits, including cash deposits. These credit unions are exempt from the payment-of-interest requirements, as long as they provide notice of their interest accrual policies in accordance with Sec. 229.16(d). For example, if a credit union has a policy of computing interest on all deposits received by the 10th of the month from the first of that month, and on all deposits received after the 10th of the month from the first of the next month, that policy is not superseded by this regulation, if the credit union provides proper disclosure of this policy to its customers.

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2. The Act limits this exemption to credit unions; other types of banks must comply with the payment-of-interest requirements. In addition, credit unions that compute interest from the day of deposit or day of credit should not change their existing practices in order to avoid compliance with the requirement that interest accrue from the day the credit union receives credit.

C. 229.14(c) Exception for Checks Returned Unpaid

1. This provision is based on section 606(c) of the Act (12 U.S.C. 4005(c)) and provides that interest need not be paid on funds deposited in an interest-bearing account by check that has been returned unpaid, regardless of the reason for return.

IX. Section 229.15 General Disclosure Requirements

A. 229.15(a) Form of Disclosures

1. This paragraph sets forth the general requirements for the disclosures required under Subpart B. All of the disclosures must be given in a clear and conspicuous manner, must be in writing, and, in most cases, must be in a form the customer may keep. Disclosures posted at locations where employees accept consumer deposits, at ATMs, and on preprinted deposit slips need not be in a form that the customer may keep. Appendix C of the regulation contains model forms, clauses, and notices to assist banks in preparing disclosures.

2. Disclosures concerning availability must be grouped together and may not contain any information that is not related to the disclosures required by this subpart. Therefore, banks may not intersperse the required disclosures with other account disclosures, and may not include other account information that is not related to their availability policy within the text of the required disclosures. Banks may, however, include information that is related to their availability policies. For example, a bank may inform its customers that, even when the bank has already made funds available for withdrawal, the customer is responsible for any problem with the deposit, such as the return of a deposited check.

3. The regulation does not require that the disclosures be segregated from other account terms and conditions. For example, banks may include the disclosure of their specific availability policy in a booklet or pamphlet that sets out all of the terms and conditions of the bank's accounts. The required disclosures must, however, be grouped together and highlighted or identified in some manner, for example, by use of a separate heading for the disclosures, such as 'When Deposits are Available for Withdrawal.'

B. 229.15(b) Uniform Reference to Day of Availability

1. This paragraph requires banks to disclose in a uniform manner when deposited funds will be available for withdrawal. Banks must disclose when deposited funds are available for withdrawal by stating the business day on which the customer may begin to withdraw funds. The business day funds will be available must be disclosed as 'the _____ business day after' the day of deposit, or substantially similar language. The business day of availability is determined by counting the number of business days starting with the business day following the banking day on which the deposit is received, as determined under Sec. 229.19(a), and ending with the business day on which the customer may begin to withdraw funds. For example, a bank that imposes delays of four intervening business days for nonlocal checks must describe those checks as being available on 'the fifth business day after' the day of the deposit.

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C. 229.15(c) Multiple Accounts and Multiple Account Holders

1. This paragraph clarifies that banks need not provide multiple disclosures under the regulation. A single disclosure to a customer that holds multiple accounts, or a single disclosure to one of the account holders of a jointly held account, satisfies the disclosure requirements of the regulation.

D. 229.15(d) Dormant or Inactive Accounts

1. This paragraph makes clear that banks need not provide disclosure of their specific availability policies to customers that hold accounts that are either dormant or inactive. The determination that certain accounts are dormant or inactive must be made by the bank. If a bank considers an account dormant or inactive for purposes other than this regulation and no longer provides statements and other mailings to an account for this reason, such an account is considered dormant or inactive for purposes of this regulation.

X. Section 229.16 Specific Availability Policy Disclosure

A. 229.16(a) General

1. This section describes the information that must be disclosed by banks to comply with ss 229.17 and 229.18(d), which require that banks furnish notices of their specific policy regarding availability of deposited funds. The disclosure provided by a bank must reflect the availability policy followed by the bank in most cases, even though a bank may in some cases make funds available sooner or impose a longer delay.

2. The disclosure must reflect the policy and practice of the bank regarding availability as to most accounts and most deposits into those accounts. In disclosing the availability policy that it follows in most cases, a bank may provide a single disclosure that reflects one policy to all its transaction account customers, even though some of its customers may receive faster availability than that reflected in the policy disclosure. Thus, a bank need not disclose to some customers that they receive faster availability than indicated in the disclosure. If, however, a bank has a policy of imposing delays in availability on any customers longer than those specified in its disclosure, those customers must receive disclosures that reflect the longer applicable availability periods.

3. A bank may disclose that funds are available for withdrawal on a given day notwithstanding the fact that the bank uses the funds to pay checks received before that day. For example, a bank may disclose that its policy is to make funds available from deposits of local checks on the second business day following the day of deposit, even though it may use the deposited funds to pay checks prior to the second business day; the funds used to pay checks in this example are not available for withdrawal until the second business day after deposit because the funds are not available for all uses until the second business day. (See the definition of available for withdrawal in Sec. 229.2(d).)

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B. 229.16(b) Content of Specific Policy Disclosure

1. This paragraph sets forth the items that must be included, as applicable, in a bank's specific availability policy disclosure. The information that must be disclosed by a particular bank will vary considerably depending upon the bank's availability policy. For example, a bank that makes deposited funds available for withdrawal on the business day following the day of deposit need simply disclose that deposited funds will be available for withdrawal on the first business day after the day of deposit, the bank's business days, and when deposits are considered received.

2. On the other hand, a bank that has a policy of routinely delaying on a blanket basis the time when deposited funds are available for withdrawal would have a more detailed disclosure. Such blanket hold policies might be for the maximum time allowed under the federal law or might be for shorter periods. These banks must disclose the types of deposits that will be subject to delays, how the customer can determine the type of deposit being made, and the day that funds from each type of deposit will be available for withdrawal.

3. Some banks may have a combination of next-day availability and blanket delays. For example, a bank may provide next-day availability for all deposits except for one or two categories, such as deposits at nonproprietary ATMs and nonlocal personal checks over a specified dollar amount. The bank would describe the categories that are subject to delays in availability and tell the customer when each category would be available for withdrawal, and state that other deposits will be available for withdrawal on the first business day after the day of deposit. Similarly, a bank that provides availability on the second business day for most of its deposits would need to identify the categories of deposits which, under the regulation, are subject to next-day availability and state that all other deposits will be available on the second business day.

4. Because many banks' availability policies may be complex, a bank must give a brief summary of its policy at the beginning of the disclosure. In addition, the bank must describe any circumstances when actual availability may be longer than the schedules disclosed. Such circumstances would arise, for example, when the bank invokes one of the exceptions set forth in Sec. 229.13 of the regulation, or when the bank delays or extends the time when deposited funds are available for withdrawal up to the time periods allowed by the regulation on a case-by-case basis. Also, a bank that must make certain checks available faster under Appendix B (reduction of schedules for certain nonlocal checks) must state that some check deposits will be available for withdrawal sooner because of special rules and that a list of the pertinent routing numbers is available upon request.

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5. Generally, a bank that distinguishes in its disclosure between local and nonlocal checks based on the routing number on the check must disclose to its customers that certain checks, such as some credit union payable-through drafts, will be treated as local or nonlocal based on the location of the bank by which they are payable (e.g., the credit union), and not on the basis of the location of the bank whose routing number appears on the check. A bank is not required to provide this disclosure, however, if it makes the proceeds of both local and nonlocal checks available for withdrawal within the time periods required for local checks in ss 229.12 and 229.13.

6. The business day cut-off time used by the bank must be disclosed and if some locations have different cut-off times the bank must note this in the disclosure and state the earliest time that might apply. A bank need not list all of the different cut-off times that might apply.

7. A bank taking advantage of the extended time period for making deposits at nonproprietary ATMs available for withdrawal under Sec. 229.12(f) must explain this in the initial disclosure. In addition, the bank must provide a list (on or with the initial disclosure) of either the bank's proprietary ATMs or those ATMs that are nonproprietary at which customers may make deposits. As an alternative to providing such a list, the bank may label all of its proprietary ATMs with the bank's name and state in the initial disclosure that this has been done. Similarly, a bank taking advantage of the cash withdrawal limitations of Sec. 229.12(d), or the provision in Sec. 229.19(e) allowing holds to be placed on other deposits when a deposit is made or a check is cashed, must explain this in the initial disclosure.

8. A bank that provides availability based on when the bank generally receives credit for deposited checks need not disclose the time when a check drawn on a specific bank will be available for withdrawal. Instead, the bank may disclose the categories of deposits that must be available on the first business day after the day of deposit (deposits subject to Sec. 229.10) and state the other categories of deposits and the time periods that will be applicable to those deposits. For example, a bank might disclose the four-digit Federal Reserve routing symbol for local checks and indicate that such checks as well as certain nonlocal checks will be available for withdrawal on the first or second business day following the day of deposit, depending on the location of the particular bank on which the check is drawn, and disclose that funds from all other checks will be available on the second or third business day. The bank must also disclose that the customer may request a copy of the bank's detailed schedule that would enable the customer to determine the availability of any check and must provide such schedule upon request. A change in the bank's detailed schedule would not trigger the change in policy disclosure requirement of Sec. 229.18(e).

C. 229.16(c) Longer Delays on a Case-by-Case Basis

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1. Notice in specific policy disclosure.

a. Banks that make deposited funds available for withdrawal sooner than required by the regulation--for example, providing their customers with immediate or next-day availability for deposited funds--and delay the time when funds are available for withdrawal only from time to time determined on a case-by-case basis, must provide notice of this in their specific availability policy disclosure. This paragraph outlines the requirements for that notice.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix D--Indorsement Standards

1. The depositary bank shall **indorse** a **check** according to the following specifications:

. The indorsement shall contain--

--The bank's nine-digit routing number, set off by arrows at each end of the number and pointing toward the number;

--The bank's name/location; and

--The indorsement date.

. The indorsement may also contain--

--An optional branch identification;

--An optional trace/sequence number;

--An optional telephone number for receipt of notification of large-dollar returned checks; and

--Other optional information provided that the inclusion of such information does not interfere with the readability of the indorsement.

The indorsement shall be written in dark purple or black ink.

The **indorsement** shall be placed on the back of the **check** so that the routing number is wholly contained in the area 3.0 inches from the leading edge of the **check** to 1.5 inches from the trailing edge of the check.1

1 The leading edge is defined as the right side of the check looking at it from the front. The trailing edge is defined as the left side of the check looking at it from the front. See American National Standards Committee on Financial Services Specification for the Placement and Location of MICR Printing, X 9.13.

2. Each subsequent collecting bank indorser shall protect the identifiability and legibility of the depositary bank indorsement by:

. Including only its nine-digit routing number (without arrows), the indorsement date, and an optional trace/sequence number;

. Using an ink color other than purple; and

. **Indorsing** in the area on the back of the **check** from 0.0 inches to 3.0 inches from the leading edge of the **check.**

3. Each returning bank indorser shall protect the identifiability and legibility of the depositary bank indorsement by:

. Using an ink color other than purple;

. Staying **clear** of the area on the back of the **check** from 3.0 inches from the leading edge of the **check** to the trailing edge of the **check.**

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<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)

Titles 1-50 current through January 1, 1996; 60 FR 67518

Appendix E to Part 229--Commentary

I. Introduction

A. Background

1. The Board interpretations, which are labeled 'Commentary' and follow each section of Regulation CC (12 CFR Part 229), provide background material to explain the Board's intent in adopting a particular part of the regulation; the Commentary also provides examples to aid in understanding how a particular requirement is to work. Under section 611(e) of the Expedited Funds Availability Act (12 U.S.C. 4010(e)), no provision of section 611 imposing any liability shall apply to any act done or omitted in good faith conformity with any rule, regulation, or interpretation thereof by the Board of Governors of the Federal Reserve System, notwithstanding the fact that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason. The Commentary is an 'interpretation' of a regulation by the Board within the meaning of section 611.

II. Section 229.2 Definitions

A. Background

1. Section 229.2 defines the terms used in the regulation. For the most part, terms are defined as they are in section 602 of the Expedited Funds Availability Act (12 U.S.C. 4001). The Board has made a number of changes for the sake of clarity, to conform the terminology to that which is familiar to the banking industry, to define terms that are not defined in the Act, and to carry out the purposes of the Act. The Board also has incorporated by reference the definitions of the Uniform Commercial Code where appropriate. Some of Regulation CC's definitions are self-explanatory and therefore are not discussed in this Commentary.

B. 229.2(a) Account

1. The Act defines account to mean 'a demand deposit account or similar transaction account at a depository institution.' The regulation defines

account in terms of the definition of transaction account in the Board's Regulation D (12 CFR part 204). The definition of account in Regulation CC, however, excludes certain deposits, such as nondocumentary obligations (see 12 CFR 204.2(a)(1)(vii)), that are covered under the definition of transaction account in Regulation D. The definition applies to accounts with general third party payment powers but does not cover time deposits or savings deposits, including money market deposit accounts, even though they may have limited third party payment powers. The Board believes that it is appropriate to exclude these accounts because of the reference to demand deposits in the Act, which suggests that the Act is intended to apply only to accounts that permit unlimited third party transfers.

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2. The term account also differs from the definition of transaction account in Regulation D because the term account refers to accounts held at banks. Under Subparts A and C, the term bank includes not only any depository institution, as defined in the Act, but also any person engaged in the business of banking, such as a Federal Reserve Bank, a Federal Home Loan Bank, or a private banker that is not subject to Regulation D. Thus, accounts at these institutions benefit from the expeditious return requirements of Subpart C.

3. Interbank deposits, including accounts of offices of domestic banks or foreign banks located outside the United States, and direct and indirect accounts of the United States Treasury (including Treasury General Accounts and Treasury Tax and Loan Deposit Accounts) are exempt from Regulation CC.

C. 229.2(b) Automated Clearinghouse (ACH)

1. The Board has defined automated clearinghouse as a facility that processes debit and credit transfers under rules established by a Federal Reserve Bank operating circular governing automated clearinghouse items or the rules of an ACH association. ACH credit transfers are included in the definition of electronic payment.

2. The reference to 'debit and credit transfers' does not refer to the corresponding debit and credit entries that are part of the same transaction, but to different kinds of ACH payments. In an ACH credit transfer, the originator orders that its account be debited and another account credited. In an ACH debit transfer, the originator, with prior authorization, orders another account to be debited and the originator's account to be credited.

3. A facility that handles only wire transfers (defined elsewhere) is not an ACH.

D. 229.2(c) Automated Teller Machine (ATM)

1. ATM is not defined in the Act. The regulation defines an ATM as an electronic device at which a natural person may make deposits to an account by cash or check and perform other account transactions. Point-of-sale terminals, machines that only dispense cash, night depositories, and lobby deposit boxes are not ATMs within the meaning of the definition, either because they do not accept deposits of cash or checks (e.g., point-of-sale terminals and cash dispensers) or because they only accept deposits (e.g., night depositories and lobby boxes) and cannot perform other transactions. A lobby deposit box or similar receptacle in which written payment orders or deposits may be placed is not an ATM.

2. A facility may be an ATM within this definition even if it is a branch under state or federal law, although an ATM is not a branch as that term is used

in this regulation.

E. 229.2(d) Available for Withdrawal

1. Under this definition, when funds become available for withdrawal, the funds may be put to all uses for which the customer may use actually and finally collected funds in the customer's account under the customer's account agreement with the bank. Examples of such uses include payment of checks drawn on the account, certification of checks, electronic payments, and cash withdrawals. Funds are available for these uses notwithstanding provisions of other law that may restrict the use of uncollected funds (e.g., 18 U.S.C. 1004; 12 U.S.C. 331).

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2. If a bank makes funds available to a customer for a specific purpose (such as paying checks that would otherwise overdraw the customer's account and be returned for insufficient funds) before the funds must be made available under the bank's policy or this regulation, it may nevertheless apply a hold consistent with this regulation to those funds for other purposes (such as cash withdrawals). For purposes of this regulation, funds are considered available for withdrawal even though they are being held by the bank to satisfy an obligation of the customer other than the customer's potential liability for the return of the check. For example, funds are available for withdrawal even though they are being held by a bank to satisfy a garnishment, tax levy, or court order restricting disbursements from the account, or to satisfy the customer's liability arising from the certification of a check, sale of a cashier's or teller's check, guaranty or acceptance of a check, or similar transaction.

F. 229.2(e) Bank

1. The Act uses the term depository institution, which it defines by reference to section 19(b)(1)(A)(i) through (vi) of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)(i) through (vi)). This regulation uses the term bank, a term that conforms to the usage the Board has previously adopted in Regulation J. Bank is also used in Articles 4 and 4A of the Uniform Commercial Code.

2. Bank is defined to include depository institutions, such as commercial banks, savings banks, savings and loan associations, and credit unions as defined in the Act, and U.S. branches and agencies of foreign banks. For purposes of Subpart B, the term does not include corporations organized under section 25A of the Federal Reserve Act, 12 U.S.C. 611-631 (Edge corporations) or corporations having an agreement or undertaking with the Board under section 25 of the Federal Reserve Act, 12 U.S.C. 601-604a (agreement corporations). For purposes of Subpart C, and in connection therewith, Subpart A, any Federal Reserve Bank, Federal Home Loan Bank, or any other person engaged in the business of banking is regarded as a bank. The phrase 'any other person engaged in the business of banking' is derived from U.C.C. 1-201(4), and is intended to cover entities that handle checks for collection and payment, such as Edge and agreement corporations, commercial lending companies under 12 U.S.C. 3101, certain industrial banks, and private bankers, so that virtually all checks will be covered by the same rules for forward collection and return, even though they may not be covered by the requirements of Subpart B. For the purposes of Subpart C, and in connection therewith, Subpart A, the term also may include a state or a unit of general local government to the extent that it pays warrants or other drafts drawn directly on the state or local government itself, and the warrants

or other drafts are sent to the state or local government for payment or collection.

3. Unless otherwise specified, the term bank includes all of a bank's offices in the United States. The regulation does not cover foreign offices of U.S. banks.

G. 229.2(f) Banking Day and (g) Business Day

1. The Act defines business day as any day excluding Saturdays, Sundays, and legal holidays. Legal holiday, however, is not defined, and the variety of local holidays, together with the practice of some banks to close midweek, makes the Act's definition difficult to apply. The Board believes that two kinds of business days are relevant. First, when determining the day when funds are deposited or when a bank must perform certain actions (such as returning a check), the focus should be on a day that the bank is actually open for business. Second, when counting days for purposes of determining when funds must be available under the regulation or when notice of nonpayment must be received by the depositary bank, there would be confusion and uncertainty in trying to follow the schedule of a particular bank, and there is less need to identify a day when a particular bank is open. Most banks that act as intermediaries (large correspondents and Federal Reserve Banks) follow the same holiday schedule. Accordingly, the regulation has two definitions: Business day generally follows the standard Federal Reserve Bank holiday schedule (which is followed by most large banks), and banking day is defined to mean that part of a business day on which a bank is open for substantially all of its banking activities.

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2. The definition of banking day corresponds to the definition of banking day in U.C.C. 4-104(a)(3), except that a banking day is defined in terms of a business day. Thus, if a bank is open on Saturday, Saturday might be a banking day for purposes of the U.C.C., but it would not be a banking day for purposes of Regulation CC because Saturday is never a business day under the regulation.

3. The definition of banking day is phrased in terms of when 'an office of a bank is open' to indicate that a bank may observe a banking day on a per-branch basis. A deposit made at an ATM or off-premise facility (such as a remote depository or a lock box) is considered made at the branch holding the account into which the deposit is made for the purpose of determining the day of deposit. All other deposits are considered made at the branch at which the deposit is received. For example, under Sec. 229.19(a)(1), funds deposited at an ATM are considered deposited at the time they are received at the ATM. On a calendar day that is a banking day for the branch or other location of the depositary bank at which the account is maintained, a deposit received at an ATM before the ATM's cut-off hour is considered deposited on that banking day, and a deposit received at an ATM after the ATM's cut-off hour is considered deposited on the next banking day of the branch or other location where the account is maintained. On a calendar day that is not a banking day for the account-holding location, all ATM deposits are considered deposited on that location's next banking day. This rule for determining the day of deposit also would apply to a deposit to an off-premise facility, such as a night depository or lock box, which is considered deposited when removed from the facility and available for processing under Sec. 229.19(a)(3). If an unstaffed facility, such as a night depository or lock box, is on branch premises, the day of deposit is determined by the banking day at the branch at which the deposit is received, whether or not it is the branch at which the account is maintained.

H. 229.2(h) Cash

1. Cash means U.S. coins and currency. The phrase in the Act 'including Federal Reserve notes' has been deleted as unnecessary. (See 31 U.S.C. 5103.)

I. 229.2(i) Cashier's Check

1. The regulation adds to the second item in the Act's definition of cashier's check the phrase, 'on behalf of the bank as drawer,' to clarify that the term cashier's check is intended to cover only checks that a bank draws on itself. The definition of cashier's check includes checks provided to a customer of the bank in connection with customer deposit account activity, such as account disbursements and interest payments. The definition also includes checks acquired from a bank by noncustomers for remittance purposes, such as certain loan disbursement checks. Cashier's checks provided to customers or others are often labeled as 'cashier's check,' 'officer's check,' or 'official check.' The definition excludes checks that a bank draws on itself for other purposes, such as to pay employees and vendors, and checks issued by the bank in connection with a payment service, such as a payroll or a bill-paying service. Cashier's checks generally are sold by banks to substitute the bank's credit for the customer's credit and thereby enhance the collectibility of the checks. A check issued in connection with a payment service generally is provided as a convenience to the customer rather than as a guarantee of the check's collectibility. In addition, such checks are often more difficult to distinguish from other types of checks than are cashier's checks as defined by this regulation.

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J. 229.2(j) Certified Check

1. The Act defines a certified check as one to which a bank has certified that the drawer's signature is genuine and that the bank has set aside funds to pay the check. Under the Uniform Commercial Code, certification of a check means the bank's signed agreement that it will honor the check as presented (U.C.C. 3-409). The regulation defines certified check to include both the Act's and U.C.C.'s definitions.

K. 229.2(k) Check

1. Check is defined in section 602(7) of the Act as a negotiable demand draft drawn on or payable through an office of a depository institution located in the United States, excluding noncash items. The regulation includes six categories of instruments within the definition of check.

2. The first category is negotiable demand drafts drawn on, or payable through or at, an office of a bank. As the definition of bank includes only offices located in the United States, this category is limited to checks drawn on, or payable through or at, a banking office located in the United States.

3. The Act treats drafts payable through a bank as checks, even though under the U.C.C. the payable-through bank is a collecting bank to make presentment and generally is not authorized to make payment (U.C.C. 4-106(a)). The Act does not expressly address items that are payable at a bank. This regulation treats both

payable-through and payable-at demand drafts as checks. The Board believes that treating demand drafts payable at a bank as checks will not have a substantial effect on the operations of payable-at banks--by far the largest proportion of payable-at items are not negotiable demand drafts, but time items, such as commercial paper, bonds, notes, bankers' acceptances, and securities. These time items are not covered by the requirements of the Act or this regulation. (The treatment of payable-through drafts is discussed in greater detail in connection with the definitions of local check and paying bank.)

4. The second category is checks drawn on Federal Reserve Banks and Federal Home Loan Banks. Principal and interest payments on federal debt instruments often are paid with checks drawn on a Federal Reserve Bank as fiscal agent of the United States, and these fiscal agency checks are indistinguishable from other checks drawn on Federal Reserve Banks. (See 31 CFR Part 355.) Federal Reserve Bank checks also are used by some banks as substitutes for cashier's or teller's checks. Similarly, savings and loan associations often use checks drawn on Federal Home Loan Banks as teller's checks. The definition of check includes checks drawn on Federal Home Loan Banks and Federal Reserve Banks because in many cases they are the functional equivalent of Treasury checks or teller's checks.

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5. The third and fourth categories of instrument included in the definition of check refer to government checks. The Act refers to checks drawn on the U.S. Treasury, even though these instruments are not drawn on or payable through an office of a depository institution, and checks drawn by state and local governments. The Act also gives the Board authority to define functionally equivalent instruments as depository checks.1 Thus, the Act is intended to apply to instruments other than those that meet the strict definition of check in section 602(7) of the Act. Checks and warrants drawn by states and local governments often are used for the purposes of making unemployment compensation payments and other payments that are important to the recipients. Consequently, the Board has expressly defined check to include drafts drawn on the U.S. Treasury and drafts or warrants drawn by a state or a unit of general local government on itself.

1 Section 602(11) of the Act (12 U.S.C. 4001(11)) defines 'depository check' as 'any cashier's check, certified check, teller's check, and any other functionally equivalent instrument as determined by the Board.'

6. The fifth category of instrument included in the definition of check is U.S. Postal Service money orders. These instruments are defined as checks because they often are used as a substitute for checks by consumers, even though money orders are not negotiable under Postal Service regulations. The Board has not provided specific rules for other types of money orders; these instruments generally are drawn on or payable through or payable at banks and are treated as checks on that basis.

7. The sixth and final category of instrument included in the definition of check is traveler's checks drawn on or payable through or at a bank. Traveler's check is defined in paragraph (hh) of this section.

8. Finally, for the purposes of Subpart C, and in connection therewith, Subpart A, the definition of check includes nonnegotiable demand drafts because these instruments are often handled as cash items in the forward collection process.

9. The definition of check does not include an instrument payable in a

foreign currency (i.e., other than in United States money as defined in 31 U.S.C. 5101) or a credit card draft (i.e., a sales draft used by a merchant or a draft generated by a bank as a result of a cash advance), or an ACH debit transfer. The definition of check includes a check that a bank may supply to a customer as a means of accessing a credit line without the use of a credit card.

L. 229.2(l) [Reserved]

M. 229.2(m) Check Processing Region

1. The Act defines this term as 'the ed by a Federal Reserve bank check processing center or the Board may prescribe by regulations.' The Board ha essing region as the territory served by one of the 46 Federal s, branches, or regional check processing centers. Apper t of routing numbers arranged by Federal Reserve Bank ion of check processing region is key to determining w nsidered local or nonlocal.

N. 229.2(n) Consumer Account

1. Consumer account is defined as an account used primarily for personal, family, or household purposes. An account that does not meet the definition of consumer account is a nonconsumer account. Both consumer and nonconsumer accounts are subject to the requirements of this regulation, including the requirement that funds be made available according to specific schedules and that the bank make specified disclosures of its availability policies. Section 229.18(b) (notices at branch locations) and Sec. 229.18(e) (notice of changes in policy) apply only to consumer accounts. Section 229.13(g)(2) (one-time exception notice) and Sec. 229.19(d) (use of calculated availability) apply only to nonconsumer accounts.

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O. 229.2(o) Depositary Bank

1. The regulation uses the term depositary bank rather than the term receiving depository institution. Receiving depository institution is a term unique to the Act, while depositary bank is the term used in Article 4 of the U.C.C. and Regulation J.

2. A depositary bank includes the bank in which the check is first deposited. If a foreign office of a U.S. or foreign bank sends checks to its U.S. correspondent bank for forward collection, the U.S. correspondent is the depositary bank because foreign offices of banks are not included in the definition of bank.

3. If a customer deposits a **check** in its account at a bank, the customer's bank is the depositary bank with respect to the **check.** For example, if a person deposits a **check** into an account at a nonproprietary ATM, the bank holding the account into which the **check** is deposited is the depositary bank even though another bank may service the nonproprietary ATM and send the **check** for collection. (Under Sec. 229.35 the depositary bank may agree with the bank servicing the nonproprietary ATM to have the servicing bank place its own **indorsement** on the **check** as the depositary bank. For the purposes of Subpart C,

foreign currency (i.e., other than in United States money as defined in 31 U.S.C. 5101) or a credit card draft (i.e., a sales draft used by a merchant or a draft generated by a bank as a result of a cash advance), or an ACH debit transfer. The definition of check includes a check that a bank may supply to a customer as a means of accessing a credit line without the use of a credit card.

L. 229.2(l) [Reserved]

M. 229.2(m) Check Processing Region

1. The Act defines this term as 'the geographic area served by a Federal Reserve bank check processing center or such larger area as the Board may prescribe by regulations.' The Board has defined check processing region as the territory served by one of the 46 Federal Reserve head offices, branches, or regional check processing centers. Appendix A includes a list of routing numbers arranged by Federal Reserve Bank office. The definition of check processing region is key to determining whether a check is considered local or nonlocal.

N. 229.2(n) Consumer Account

1. Consumer account is defined as an account used primarily for personal, family, or household purposes. An account that does not meet the definition of consumer account is a nonconsumer account. Both consumer and nonconsumer accounts are subject to the requirements of this regulation, including the requirement that funds be made available according to specific schedules and that the bank make specified disclosures of its availability policies. Section 229.18(b) (notices at branch locations) and Sec. 229.18(e) (notice of changes in policy) apply only to consumer accounts. Section 229.13(g)(2) (one-time exception notice) and Sec. 229.19(d) (use of calculated availability) apply only to nonconsumer accounts.

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O. 229.2(o) Depositary Bank

1. The regulation uses the term depositary bank rather than the term receiving depository institution. Receiving depository institution is a term unique to the Act, while depositary bank is the term used in Article 4 of the U.C.C. and Regulation J.

2. A depositary bank includes the bank in which the check is first deposited. If a foreign office of a U.S. or foreign bank sends checks to its U.S. correspondent bank for forward collection, the U.S. correspondent is the depositary bank because foreign offices of banks are not included in the definition of bank.

3. If a customer deposits a **check** in its account at a bank, the customer's bank is the depositary bank with respect to the **check.** For example, if a person deposits a **check** into an account at a nonproprietary ATM, the bank holding the account into which the **check** is deposited is the depositary bank even though another bank may service the nonproprietary ATM and send the **check** for collection. (Under Sec. 229.35 the depositary bank may agree with the bank servicing the nonproprietary ATM to have the servicing bank place its own **indorsement** on the **check** as the depositary bank. For the purposes of Subpart C,

the bank applying its **indorsement** as the depositary bank **indorsement** on the **check** is the depositary bank.)

4. For purposes of Subpart B, a bank may act as both the depositary bank and the paying bank with respect to a check, if the check is payable by the bank in which it was deposited, or if the check is payable by a nonbank payor and payable through or at the bank in which it was deposited. A bank also is considered a depositary bank with respect to checks it receives as payee. For example, a bank is a depositary bank with respect to checks it receives for loan repayment, even though these checks are not deposited in an account at the bank. Because these checks would not be 'deposited to accounts,' they would not be subject to the availability or disclosure requirements of Subpart B.

P. 229.2(p) Electronic Payment

1. Electronic payment is defined to mean a wire transfer as defined in Sec. 229.2(11) or an ACH credit transfer. The Act requires that funds deposited by wire transfer be made available for withdrawal on the business day following deposit but expressly leaves the definition of the term wire transfer to the Board. Because ACH credit transfers frequently involve important consumer payments, such as wages, the regulation requires that funds deposited by ACH credit transfers be available for withdrawal on the business day following deposit.

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2. ACH debit transfers, even though they may be transmitted electronically, are not defined as electronic payments because the receiver of an ACH debit transfer has the right to return the transfer, which would reverse the credit given to the originator. Thus, ACH debit transfers are more like checks than wire transfers. Further, bank customers that receive funds by originating ACH debit transfers are primarily large corporations, which generally would be able to negotiate with their banks for prompt availability.

3. A point-of-sale transaction would not be considered an electronic payment unless the transaction was effected by means of an ACH credit transfer or wire transfer.

Q. 229.2(q) Forward Collection

1. Forward collection is defined to mean the process by which a bank sends a check to the paying bank for payment as distinguished from the process by which the check is returned after nonpayment. Noncash collections are not included in the term forward collection.

R. 229.2(r) Local Check

1. Local check is defined as a check payable by or at a local paying bank, or, in the case of nonbank payors, payable through a local paying bank. A check payable by a local bank but payable through a nonlocal bank is a local check. Conversely, a check payable through a local bank but payable by a nonlocal bank is a nonlocal check. Where two banks are named on a check and neither is designated as a payable-through bank, the check is considered payable by either bank and may be considered local or nonlocal depending on the bank to which it is sent for payment. Generally, the depositary bank may rely on the routing number to determine whether a check is local or nonlocal. Appendix A includes a list of routing numbers arranged by Federal Reserve Bank Office to assist persons in determining whether or not such a check is local. If, however, a

check is payable by one bank but payable through another bank, the routing number appearing on the check will be that of the payable-through bank, not the paying bank. Many credit union share drafts and certain other checks payable by banks are payable through other banks. In such cases, the routing number cannot be relied on to determine whether the check is local or nonlocal. For payable-through checks that meet the labeling requirements of Sec. 229.36(e), the depositary bank may rely on the four-digit routing symbol of the paying bank that is printed on the face of the check as required by that section, e.g., in the title plate, but not on the first four digits of the payable-through bank's routing number printed in magnetic ink in the MICR line or in fractional form, to determine whether the check is local or nonlocal.

S. 229.2(s) Local Paying Bank

1. Local paying bank is defined as a paying bank located in the same check processing region as the branch or proprietary ATM of the depositary bank.
2. Examples.

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a. If a check that is payable by a bank that is located in the same check processing region as the depositary bank is payable through a bank located in another check processing region, the check is considered local or nonlocal depending on the location of the bank by which it is payable even if the check is sent to the nonlocal bank for collection.

b. The location of the depositary bank is determined by the physical location of the branch or proprietary ATM at which a check is deposited. If the branch of the depositary bank located in one check processing region sends a check to the depositary bank's central facility in another check processing region, and the central facility is in the same check processing region as the paying bank, the check is still considered nonlocal. (See Commentary on definition of paying bank.)

T. 229.2(t) Merger Transaction

1. Merger transaction is a term used in Subparts B and C in connection with transition rules for merged banks. It encompasses mergers, consolidations, and purchase/assumption transactions of the type that usually must be approved under the Bank Merger Act (12 U.S.C. 1828(c)) or similar statutes; it does not encompass acquisitions of a bank under the Bank Holding Company Act (12 U.S.C. 1842) where an acquired bank maintains its separate corporate existence.
2. Regulation CC adopts a one-year transition period for banks that are party to a merger transaction during which the merged banks will continue to be treated as separate entities. (See ss 229.19(g) and 229.40.)

U. 229.2(u) Noncash Item

1. The Act defines the term check to exclude noncash items, and defines noncash items to include checks to which another document is attached, checks accompanied by special instructions, or any similar item classified as a noncash item in the Board's regulation. To qualify as a noncash item, an item must be handled as such and may not be handled as a cash item by the depositary bank.
2. The regulation's definition of noncash item also includes checks that consist of more than a single thickness of paper (except checks that qualify for handling by automated check processing equipment, e.g. those placed in carrier envelopes) and checks that have not been preprinted or post-encoded in magnetic

ink with the paying bank's routing number, as well as checks with documents attached or accompanied by special instructions. (In the context of this definition, paying bank refers to the paying bank as defined for purposes of Subpart C.)

3. A check that has been preprinted or post-encoded with a routing number that has been retired (e.g., because of a merger) for at least three years is a noncash item unless the current number is added for processing purposes by placing the check in an encoded carrier envelope or adding a strip to the check.

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4. Checks that are accompanied by special instructions are also noncash items. For example, a person concerned about whether a check will be paid may request the depositary bank to send a check for collection as a noncash item with an instruction to the paying bank to notify the depositary bank promptly when the check is paid or dishonored.

5. For purposes of forward collection, a copy of a check is neither a check nor a noncash item, but may be treated as either. For purposes of return, a copy is generally a notice in lieu of return. (See ss 229.30(f) and 229.31(f).)

V. 229.2(v) [Reserved]

W. 229.2(w) [Reserved]

X. 229.2(x) [Reserved]

Y. 229.2(y) [Reserved]

Z. 229.2(z) Paying Bank

1. The regulation uses this term in lieu of the Act's 'originating depository institution.' For purposes of Subpart B, the term paying bank includes the payor bank, the payable-at bank to which a check is sent, or, if the check is payable by a nonbank payor, the bank through which the check is payable and to which it is sent for payment or collection. For purposes of Subpart C, the term includes the payable-through bank and the bank whose routing number appears on the check regardless of whether the check is payable by a different bank, provided that the check is sent for payment or collection to the payable-through bank or the bank whose routing number appears on the check.

2. Under ss 229.30 and 229.36(a), a bank designated as a payable-through bank or payable-at bank and to which the **check** is sent for payment or collection is responsible for the expedited return of **checks** and notice of nonpayment requirements of Subpart C. The payable-through or payable-at bank may contract with the payor with respect to its liability in discharging these responsibilities. The Board believes that the Act makes a **clear** connection between availability and the time it takes for **checks** to be **cleared** and returned. Allowing the payable-through bank additional time to forward **checks** to the payor and await return or pay instructions from the payor would delay the return of these **checks,** increasing the risks to depositary banks. Subpart C places on payable-through and payable-at banks the requirements of expeditious return based on the time the payable-through or payable-at bank received the **check** for forward collection.

3. If a check is sent for forward collection based on the routing number, the bank associated with the routing number is a paying bank for the purposes of Subpart C requirements, including notice of nonpayment, even if the check is not drawn by a customer of that bank or the check is fraudulent.

4. The phrase 'and to which [the check] is sent for payment or collection' includes sending not only the physical check, but information regarding the check under a truncation arrangement.

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5. Federal Reserve Banks and Federal Home Loan Banks are also paying banks under all subparts of the regulation with respect to checks payable by them, even though such banks are not defined as banks for purposes of Subpart B.

AA. 229.2(aa) Proprietary ATM

1. All deposits at nonproprietary ATMs are treated as deposits of nonlocal checks, and deposits at proprietary ATMs generally are treated as deposits at banking offices. The Conference Report on the Act indicates that the special availability rules for deposits received through nonproprietary ATMs are provided because 'nonproprietary ATMs today do not distinguish among check deposits or between check and cash deposits' (H.R. Rep. No. 261, 100th Cong., 1st Sess. at 179 (1987)). Thus, a deposit of any combination of cash and checks at a nonproprietary ATM may be treated as if it were a deposit of nonlocal checks, because the depositary bank does not know the makeup of the deposit and consequently is unable to place different holds on cash, local check, and nonlocal check deposits made at the ATM.

2. A colloquy between Senators Proxmire and Dodd during the floor debate on the Competitive Equality Banking Act (133 Cong. Rec. S11289 (Aug. 4, 1987)) indicates that whether a bank operates the ATM is the primary criterion in determining whether the ATM is proprietary to that bank. Because a bank should be capable of ascertaining the composition of deposits made to an ATM operated by that bank, an exception to the availability schedules is not warranted for these deposits. If more than one bank meets the 'owns or operates' criterion, the ATM is considered proprietary to the bank that operates it. For the purpose of this definition, the bank that operates an ATM is the bank that puts checks deposited into the ATM into the forward collection stream. An ATM owned by one or more banks, but operated by a nonbank servicer, is considered proprietary to the bank or banks that own it.

3. The Act also includes location as a factor in determining whether an ATM that is either owned or operated by a bank is proprietary to that bank. The definition of proprietary ATM includes an ATM located on the premises of the bank, either inside the branch or on its outside wall, regardless of whether the ATM is owned or operated by that bank. Because the Act also defines a proprietary ATM as one that is 'in close proximity' to the bank, the regulation defines an ATM located within 50 feet of a bank to be proprietary to that bank unless it is identified as being owned or operated by another entity. The Board believes that the statutory proximity test was designed to apply to situations where it would appear to the depositor that the ATM is run by his or her bank, because of the proximity of the ATM to the bank. The Board believes that an ATM located within 50 feet of a banking office would be presumed proprietary to that bank unless it is clearly identified as being owned or operated by another entity.

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BB. 229.2(bb) Qualified Returned Check

1. Subpart C requires the paying bank and returning bank(s) to return checks in an expeditious manner. The banks may meet this responsibility by returning a check to the depositary bank by the same general means used for forward collection of a check from the depositary bank to the paying bank. One way to speed the return process is to prepare the returned check for automated processing. Returned checks can be automated by either the paying bank or a returning bank by placing the returned check in a carrier envelope or by placing a strip on the bottom of the returned check and encoding the envelope or strip with the routing number of the depositary bank, the amount of the check, and a special return identifier. Returned checks are identified by placing a '2' in position 44 of the MICR line. (See American National Standards Committee on Financial Services, Specification for the Placement and Location of MICR Printing, X9.13 (Sept. 8, 1983) hereinafter referred to as 'ANSI X9.13-1983.')

2. Generally, under the standard of care imposed by Sec. 229.38, a paying or returning bank would be liable for any damages incurred due to misencoding of the routing number, the amount of the **check,** or return identifier on a qualified returned **check** unless the error was due to problems with the depositary bank's **indorsement.** (See also discussion of Sec. 229.38(c).) A qualified returned **check** that contains an encoding error would still be a qualified returned **check** for purposes of the regulation.

3. A qualified returned **check** need not contain the elements of a **check** drawn on the depositary bank, such as the name of the depositary bank. Because **indorsements** and other information on carrier envelopes or strips will not appear on a returned **check** itself, banks will wish to retain carrier envelopes and/or microfilm or other records of carrier envelopes or strips with their **check** records.

CC. 229.2(cc) Returning Bank

1. Returning bank is defined to mean any bank (excluding the paying bank and the depositary bank) handling a returned check. A returning bank may or may not be a bank that handled the returned check in the forward collection process. A returning bank includes a bank that agrees to handle a returned check for expeditious return to the depositary bank under Sec. 229.31(a). A returning bank is also a collecting bank for the purpose of a collecting bank's duty to exercise ordinary care under U.C.C. 4-202(b) and is analogous to a collecting bank for purposes of final settlement. (See Commentary to Sec. 229.35(b).)

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DD. 229.2(dd) Routing Number

1. Each bank is assigned a routing number by Thomson Financial Publishing Inc., as agent for the American Bankers Association. The routing number takes two forms--a fractional form and a nine-digit form. A paying bank is identified by both the fractional form routing number (which normally appears in the upper right hand corner of the **check)** and the nine-digit form. The nine-digit routing number of the paying bank generally is printed in magnetic ink near the bottom of the **check** (the MICR strip; see ANSI X9.13-1983). Subpart C requires depositary banks and subsequent collecting banks to place their routing numbers in nine-digit form in their **indorsements.**

EE. 229.2(ee) [Reserved]

FF. 229.2(ff) [Reserved]

GG. 229.2(gg) Teller's Check

1. Teller's check is defined in the Act to mean a check issued by a depository institution and drawn on another depository institution. The definition in the regulation includes not only checks drawn by a bank on another bank, but also checks payable through or at a bank. This would include checks drawn on a nonbank, as long as the check is payable through or at a bank. The definition does not include checks that are drawn by a nonbank on a nonbank even if payable through or at a bank. The definition includes checks provided to a customer of the bank in connection with customer deposit account activity, such as account disbursements and interest payments. The definition also includes checks acquired from a bank by a noncustomer for remittance purposes, such as certain loan disbursement checks. The definition excludes checks used by the bank to pay employees or vendors and checks issued by the bank in connection with a payment service, such as a payroll or a bill-paying service. Teller's checks generally are sold by banks to substitute the bank's credit for the customer's credit and thereby enhance the collectibility of the checks. A check issued in connection with a payment service generally is provided as a convenience to the customer rather than as a guarantee of the check's collectibility. In addition, such checks are often more difficult to distinguish from other types of checks than are teller's checks as defined by this regulation.

HH. 229.2(hh) Traveler's Check

1. The Act and regulation require that traveler's checks be treated as cashier's, teller's, or certified checks when a new depositor opens an account. (See Sec. 229.13(a); 12 U.S.C. 4003(a)(1)(C).) The Act does not define traveler's check.

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2. One element of the definition states that a traveler's check is 'drawn on or payable through or at a bank.' Traveler's checks that are not issued by banks may not have any words on them identifying a bank as drawee or paying agent, but may bear unique routing numbers with an 8000 prefix that identifies a bank as paying agent.

3. Because a traveler's check is payable by, at, or through a bank, it is also a check for purposes of this regulation. When not subject to the next-day availability requirement for new accounts, a traveler's check should be treated as a local or nonlocal check depending on the location of the paying bank. The depositary bank may rely on the designation of the paying bank by the routing number to determine whether local or nonlocal treatment is required.

II. 229.2(ii) Uniform Commercial Code

1. Uniform Commercial Code is defined as the version of the Code adopted by the individual states. For purposes of uniform citation, all citations to the U.C.C. in this part refer to the Official Text as approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

JJ. 229.2(jj) [Reserved]

KK. 229.2(kk) Unit of General Local Government

1. Unit of general local government is defined to include a city, county, parish, town, township, village, or other general purpose political subdivision of a state. The term does not include special purpose units, such as school districts, water districts, or Indian nations.

LL. 229.2(ll) Wire Transfer

1. The Act delegates to the Board the authority to define the term wire transfer. The regulation defines wire transfer as an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary, upon receipt or on a day stated in the order, that is transmitted by electronic or other means over certain networks or on the books of banks and that is used primarily to transfer funds between commercial accounts. 'Unconditional' means that no condition, such as presentation of documents, must be met before the bank receiving the order is to make payment. A wire transfer may be transmitted by electronic or other means. 'Electronic means' include computer-to-computer links, on-line terminals, telegrams (including TWX, TELEX, or similar methods of communication), telephone calls, or other similar methods. Fedwire (the Federal Reserve's wire transfer network), CHIPS (Clearing House Interbank Payments System, operated by the New York Clearing House), and book transfers among banks or within one bank are covered by this definition. Credits for credit and debit card transactions are not wire transfers. The term wire transfer excludes electronic fund transfers as that term is defined by the Electronic Fund Transfer Act.

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MM. 229.2(mm) [Reserved]

NN. 229.2(nn) Good Faith

1. This definition of good faith derives from U.C.C. 3-103(a)(4).

OO. 229.2(oo) Interest Compensation

1. This calculation of interest compensation derives from U.C.C. 4A-506(b). (See ss 229.34(d) and 229.36(f).)

III. Section 229.3 Administrative Enforcement [Reserved]

IV. Section 229.10 Next-Day Availability

A. Business Days and Banking Days

1. This section, as well as other provisions of this subpart governing the availability of funds, provides that funds must be made available for withdrawal not later than a specified number of business days following the banking day on which the funds are deposited. Thus, a deposit is considered made only on a banking day, i.e., a day that the bank is open to the public for carrying on

substantially all of its banking functions. For example, if a deposit is made at an ATM on a Saturday, Sunday, or other day on which the bank is closed to the public, the deposit is considered received on that bank's next banking day.

2. Nevertheless, business days are used to determine the number of days following the banking day of deposit that funds must be available for withdrawal. For example, if a deposit of a local check were made on a Monday, the availability schedule requires that funds be available for withdrawal on the second business day after deposit. Therefore, funds must be made available on Wednesday regardless of whether the bank was closed on Tuesday for other than a standard legal holiday as specified in the definition of business day.

B. 229.10(a) Cash Deposits

1. This paragraph implements the Act's requirement for next-day availability for cash deposits to accounts at a depositary bank 'staffed by individuals employed by such institution.'2 Under this paragraph, cash deposited in an account at a staffed teller station on a Monday must become available for withdrawal by the start of business on Tuesday. It must become available for withdrawal by the start of business on Wednesday if it is deposited by mail, at a proprietary ATM, or by other means other than at a staffed teller station.

2 Nothing in the Act or this regulation affects terms of account arrangements, such as negotiable order of withdrawal accounts, which may require prior notice of withdrawal. (See 12 CFR 204.2(e)(2).)

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C. 229.10(b) Electronic Payments

1. The Act provides next-day availability for funds received for deposit by wire transfer. The regulation uses the term electronic payment, rather than wire transfer, to include both wire transfers and ACH credit transfers under the next-day availability requirement. (See discussion of definitions of automated clearinghouse, electronic payment, and wire transfer in Sec. 229.2.)

2. The Act requires that funds received by wire transfer be available for withdrawal not later than the business day following the day a wire transfer is received. This paragraph clarifies what constitutes receipt of an electronic payment. For the purposes of this paragraph, a bank receives an electronic payment when the bank receives both payment in finally collected funds and the payment instructions indicating the customer accounts to be credited and the amount to be credited to each account. For example, in the case of Fedwire, the bank receives finally collected funds at the time the payment is made. (See 12 CFR 210.31.) Finally collected funds generally are received for an ACH credit transfer when they are posted to the receiving bank's account on the settlement day. In certain cases, the bank receiving ACH credit payments will not receive the specific payment instructions indicating which accounts to credit until after settlement day. In these cases, the payments are not considered received until the information on the account and amount to be credited is received.

3. This paragraph also establishes the extent to which an electronic payment is considered made. Thus, if a participant on a private network fails to settle and the receiving bank receives finally settled funds representing only a partial amount of the payment, it must make only the amount that it actually

received available for withdrawal.

4. The availability requirements of this regulation do not preempt or invalidate other rules, regulations, or agreements which require funds to be made available on a more prompt basis. For example, the next-day availability requirement for ACH credits in this section does not preempt ACH association rules and Treasury regulations (31 CFR part 210), which provide that the proceeds of these credit payments be available to the recipient for withdrawal on the day the bank receives the funds.

D. 229.10(c) Certain Check Deposits

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1. The Act generally requires that funds be made available on the business day following the banking day of deposit for Treasury checks, state and local government checks, cashier's checks, certified checks, teller's checks, and 'on us' checks, under specified conditions. (Treasury checks are checks drawn on the Treasury of the United States and have a routing number beginning with the digits '0000.') This section also requires next-day availability for additional types of checks not addressed in the Act. Checks drawn on a Federal Reserve Bank or a Federal Home Loan Bank and U.S. Postal Service money orders also must be made available on the first business day following the day of deposit under specified conditions. For the purposes of this section, all checks drawn on a Federal Reserve Bank or a Federal Home Loan Bank that contain in the MICR line a routing number that is listed in Appendix A are subject to the next-day availability requirement if they are deposited in an account held by a payee of the check and in person to an employee of the depositary bank, regardless of the purposes for which the checks were issued. For all new accounts, even if the new account exception is not invoked, traveler's checks must be included in the $5,000 aggregation of checks deposited on any one banking day that are subject to the next-day availability requirement. (See Sec. 229.13(a).)

2. Deposit in Account of Payee. One statutory condition to receipt of next-day availability of Treasury **checks,** state and local government **checks,** cashier's **checks,** certified **checks,** and teller's **checks** is that the **check** must be **'endorsed** only by the person to whom it was issued.' The Act could be interpreted to include a **check** that has been **indorsed** in blank and deposited into an account of a third party that is not named as payee. The Board believes that such a **check** presents greater risks than a **check** deposited by the payee and that Congress did not intend to require next-day availability for such **checks.** The regulation, therefore, provides that funds must be available on the business day following deposit only if the **check** is deposited in an account held by a payee of the **check.** For the purposes of this section, payee does not include transferees other than named payees. The regulation also applies this condition to Postal Service money orders and **checks** drawn on Federal Reserve Banks and Federal Home Loan Banks.

3. Deposits Made to an Employee of the Depositary Bank.

a. In most cases, next-day availability of the proceeds of checks subject to this section is conditioned on the deposit of these checks in person to an employee of the depositary bank. If the deposit is not made to an employee of the depositary bank on the premises of such bank, the proceeds of the deposit must be made available for withdrawal by the start of business on the second business day after deposit, under paragraph (c)(2) of this section. For example, second-day availability rather than next-day availability would be allowed for deposits of checks subject to this section made at a proprietary ATM, night depository, through the mail or a lock box, or at a teller station

staffed by a person who is not an employee of the depositary bank. Second-day availability also may be allowed for deposits picked up by an employee of the depositary bank at the customer's premises; such deposits would be considered made upon receipt at the branch or other location of the depositary bank.

b. In the case of Treasury checks, the Act and regulation do not condition the receipt of next-day availability to deposits at staffed teller stations. Therefore, Treasury checks deposited at a proprietary ATM must be accorded next-day availability, if the check is deposited to an account of a payee of the check.

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4. 'On Us' Checks. The Act and regulation require next-day availability for 'on us' checks, i.e., checks deposited in a branch of the depositary bank and drawn on the same or another branch of the same bank, if both branches are located in the same state or check processing region. Thus, checks deposited in one branch of a bank and drawn on another branch of the same bank must receive next-day availability even if the branch on which the checks are drawn is located in another check processing region but in the same state as the branch in which the check is deposited. For the purposes of this requirement, deposits at facilities that are not located on the premises of a brick-and-mortar branch of the bank, such as off-premise ATMs and remote depositories, are not considered deposits made at branches of the depositary bank.

5. First $100.

a. The Act and regulation also require that up to $100 of the aggregate deposit by check or checks not subject to next-day availability on any one banking day be made available on the next business day. For example, if $70 were deposited in an account by check(s) on a Monday, the entire $70 must be available for withdrawal at the start of business on Tuesday. If $200 were deposited by check(s) on a Monday, this section requires that $100 of the funds be available for withdrawal at the start of business on Tuesday. The portion of the customer's deposit to which the $100 must be applied is at the discretion of the depositary bank, as long as it is not applied to any checks subject to next-day availability. The $100 next-day availability rule does not apply to deposits at nonproprietary ATMs.

b. The $100 that must be made available under this rule is in addition to the amount that must be made available for withdrawal on the business day after deposit under other provisions of this section. For example, if a customer deposits a $1,000 Treasury check, and a $1,000 local check in its account on Monday, $1,100 must be made available for withdrawal on Tuesday--the proceeds of the $1,000 Treasury check, as well as the first $100 of the local check.

c. A depositary bank may aggregate all local and nonlocal check deposits made by the customer on a given banking day for the purposes of the $100 next-day availability rule. Thus, if a customer has two accounts at the depositary bank, and on a particular banking day makes deposits to each account, $100 of the total deposited to the two accounts must be made available on the business day after deposit. Banks may aggregate deposits to individual and joint accounts for the purposes of this provision.

d. If the customer deposits a $500 local check, and gets $100 cash back at the time of deposit, the bank need not make an additional $100 available for withdrawal on the following day. Similarly, if the customer depositing the local check has a negative book balance, or negative available balance in its account at the time of deposit, the $100 that must be available on the next business day may be made available by applying the $100 to the negative balance, rather than making the $100 available for withdrawal by cash or check on the following day.

6. Special Deposit Slips.

a. Under the Act, a depositary bank may require the use of a special deposit slip as a condition to providing next-day availability for certain types of checks. This condition was included in the Act because many banks determine the availability of their customers' check deposits in an automated manner by reading the MICR-encoded routing number on the deposited checks. Using these procedures, a bank can determine whether a check is a local or nonlocal check, a check drawn on the Treasury, a Federal Reserve Bank, a Federal Home Loan Bank, or a branch of the depositary bank, or a U.S. Postal Service money order. Appendix A includes the routing numbers of certain categories of checks that are subject to next-day availability. The bank cannot require a special deposit slip for these checks.

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b. A bank cannot distinguish whether the check is a state or local government check, cashier's check, certified check, or teller's check by reading the MICR-encoded routing number, because these checks bear the same routing number as other checks drawn on the same bank that are not accorded next-day availability. Therefore, a bank may require a special deposit slip for these checks.

c. The regulation specifies that if a bank decides to require the use of a special deposit slip (or a special deposit envelope in the case of a deposit at an ATM or other unstaffed facility) as a condition to granting next-day availability under paragraphs (c)(1)(iv) or (c)(1)(v) of this section or second-day availability under paragraph (c)(2) of this section, and if the deposit slip that must be used is different from the bank's regular deposit slips, the bank must either provide the special slips to its customers or inform its customers how such slips may be obtained and make the slips reasonably available to the customers.

d. A bank may meet this requirement by providing customers with an order form for the special deposit slips and allowing sufficient time for the customer to order and receive the slips before this condition is imposed. If a bank provides deposit slips in its branches for use by its customers, it also must provide the special deposit slips in the branches. If special deposit envelopes are required for deposits at an ATM, the bank must provide such envelopes at the ATM.

e. Generally, a teller is not required to advise depositors of the availability of special deposit slips merely because checks requiring special deposit slips for next-day availability are deposited without such slips. If a bank provides the special deposit slips only upon the request of a depositor, however, the teller must advise the depositor of the availability of the special deposit slips, or the bank must post a notice advising customers that the slips are available upon request. If a bank prepares a deposit for a depositor, it must use a special deposit slip where appropriate. A bank may require the customer to segregate the checks subject to next-day availability for which special deposit slips could be required, and to indicate on a regular deposit slip that such checks are being deposited, if the bank so instructs its customers in its initial disclosure.

V. Section 229.11 [Reserved]

VI. Section 229.12 Availability Schedule

A. 229.12(a) Effective Date

1. The availability schedule set forth in this section supersedes the temporary schedule that was effective September 1, 1988, through August 31, 1990.

B. 229.12(b) Local Checks and Certain Other Checks

1. Local checks must be made available for withdrawal not later than the second business day following the banking day on which the checks were deposited.

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2. In addition, the proceeds of Treasury checks and U.S. Postal Service money orders not subject to next-day (or second-day) availability under Sec. 229.10(c), checks drawn on Federal Reserve Banks and Federal Home Loan Banks, checks drawn by a state or unit of general local government, cashier's checks, certified checks, and teller's checks not subject to next-day (or second-day) availability under Sec. 229.10(c) and payable in the same check processing region as the depositary bank, must be made available for withdrawal by the second business day following deposit.

3. Exceptions are made for withdrawals by cash or similar means and for deposits in banks located outside the 48 contiguous states. Thus, the proceeds of a local check deposited on a Monday generally must be made available for withdrawal on Wednesday.

C. 229.12(c) Nonlocal Checks

1. Nonlocal checks must be made available for withdrawal not later than the fifth business day following deposit, i.e., proceeds of a nonlocal check deposited on a Monday must be made available for withdrawal on the following Monday. In addition, a check described in Sec. 229.10(c) that does not meet the conditions for next-day availability (or second-day availability) is treated as a nonlocal check, if the check is drawn on or payable through or at a nonlocal paying bank. Adjustments are made to the schedule for withdrawals by cash or similar means and deposits in banks located outside the 48 contiguous states.

2. Reduction in Schedules.

a. Section 603(d)(1) of the Act (12 U.S.C. 4002(d)(1)) requires the Board to reduce the statutory schedules for any category of checks where most of those checks would be returned in a shorter period of time than provided in the schedules. The conferees indicated that 'if the new system makes it possible for two-thirds of the items of a category of checks to meet this test in a shorter period of time, then the Federal Reserve must shorten the schedules accordingly.' H.R. Rep. No. 261, 100th Cong., 1st Sess. at 179 (1987).

b. Reduced schedules are provided for certain nonlocal checks where significant improvements can be made to the Act's schedules due to transportation arrangements or proximity between the check processing regions of the depositary bank and the paying bank, allowing for faster collection and return. Appendix B sets forth the specific reduction of schedules applicable to banks located in certain check processing regions.

c. A reduction in schedules may apply even in those cases where the determination that the check is nonlocal cannot be made based on the routing number on the check. For example, a nonlocal credit union payable-through share draft may be subject to a reduction in schedules if the routing number of the payable-through bank that appears on the draft is included in Appendix B, even though the determination that the payable-through share draft is nonlocal is based on the location of the credit union and not the routing number on the

draft.

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D. 229.12(d) Time Period Adjustment for Withdrawal by Cash or Similar Means

1. The Act provides an adjustment to the availability rules for cash withdrawals. Funds from local and nonlocal checks need not be available for cash withdrawal until 5:00 p.m. on the day specified in the schedule. At 5:00 p.m., $400 of the deposit must be made available for cash withdrawal. This $400 is in addition to the first $100 of a day's deposit, which must be made available for withdrawal at the start of business on the first business day following the banking day of deposit. If the proceeds of local and nonlocal checks become available for withdrawal on the same business day, the $400 withdrawal limitation applies to the aggregate amount of the funds that became available for withdrawal on that day. The remainder of the funds must be available for cash withdrawal at the start of business on the business day following the business day specified in the schedule.

2. The Act recognizes that the $400 that must be provided on the day specified in the schedule may exceed a bank's daily ATM cash withdrawal limit, and explicitly provides that the Act does not supersede the bank's policy in this regard. The Board believes that the rationale for accommodating a bank's ATM withdrawal limit also applies to other cash withdrawal limits established by that bank. Section 229.19(c)(4) of the regulation addresses the relation between a bank's cash withdrawal limit (for over-the-counter cash withdrawals as well as ATM cash withdrawals) and the requirements of this subpart.

3. The Board believes that the Congress included this special cash withdrawal rule to provide a depositary bank with additional time to learn of the nonpayment of a check before it must make funds available to its customer. If a customer deposits a local check on a Monday, and that check is returned by the paying bank, the depositary bank may not receive the returned check until Thursday, the day after funds for a local check ordinarily must be made available for withdrawal. The intent of the special cash withdrawal rule is to minimize this risk to the depositary bank. For this rule to minimize the depositary bank's risk, it must apply not only to cash withdrawals, but also to withdrawals by other means that result in an irrevocable debit to the customer's account or commitment to pay by the bank on the customer's behalf during the day. Thus, the cash withdrawal rule also includes withdrawals by electronic payment, issuance of a cashier's or teller's check, certification of a check, or other irrevocable commitment to pay, such as authorization of an on-line point-of-sale debit. The rule also would apply to checks presented over the counter for payment on the day of presentment by the depositor or another person. Such checks could not be dishonored for insufficient funds if an amount sufficient to cover the check had became available for cash withdrawal under this rule; however, payment of such checks would be subject to the bank's cut-off hour established under U.C.C. 4-108. The cash withdrawal rule does not apply to checks and other provisional debits presented to the bank for payment that the bank has the right to return.

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E. 229.12(e) Extension of Schedule for Certain Deposits in

(C) Any 'when distributed' security was distributed under a published plan;
(D) A security owned by the customer has matured or has been redeemed and a new refunding security of the same issuer has been purchased by the customer, provided:
(1) The customer purchased the new security no more than 35 calendar days prior to the date of maturity or redemption of the old security;
(2) The customer is entitled to the proceeds of the redemption; and
(3) The delayed payment does not exceed 103 percent of the proceeds of the old security.
(ii) In the case of the purchase of a foreign security, within one payment period of the trade date or the date on which settlement is required to occur by the rules of the foreign securities market, provided this period does not exceed the maximum time permitted by this part for delivery against payment transactions.
(2) Delivery against payment. If a creditor purchases for or sells to a customer a security in a delivery against payment transaction, the creditor shall have up to 35 calendar days to obtain payment if delivery of the security is delayed due to the mechanics of the transaction and is not related to the customer's willingness or ability to pay.
(3) Shipment of securities, extension. If any shipment of securities is incidental to consummation of a transaction, a creditor may extend the payment period by the number of days required for shipment, but by not more than one additional payment period.
(4) Cancellation; liquidation; minimum amount. A creditor shall promptly cancel or otherwise liquidate a transaction or any part of a transaction for which the customer has not made full cash payment within the required time. A creditor may, at its option, disregard any sum due from the customer not exceeding $1000.
(c) 90 day freeze.
(1) If a nonexempted security in the account is sold or delivered to another broker or dealer without having been previously paid for in full by the customer, the privilege of delaying payment beyond the trade date shall be withdrawn for 90 calendar days following the date of sale of the security. Cancellation of the transaction other than to correct an error shall constitute a sale.

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(2) The 90 day freeze shall not apply if: (i) Within the period specified in paragraph (b)(1) of this section, full payment is received or any **check** or draft in payment has **cleared** and the proceeds from the sale are not withdrawn prior to such payment or **check clearance**; or (ii) the purchased security was delivered to another broker or dealer for deposit in a cash account which holds sufficient funds to pay for the security. The creditor may rely on a written statement accepted in good faith from the other broker or dealer that sufficient funds are held in the other cash account.
(d) Extension of time periods; transfers.
(1) Unless the creditor's examining authority believes that the creditor is not acting in good faith or that the creditor has not sufficiently determined that exceptional circumstances warrant such action, it may upon application by the creditor:
(i) Extend any period specified in paragraph (b) of this section;
(ii) Authorize transfer to another account of any transaction involving the purchase of a margin or exempted security; or
(iii) Grant a waiver from the 90 day freeze.
(2) Applications shall be filed and acted upon prior to the end of the payment period, or in the case of the purchase of a foreign security within the

period specified in paragraph (b)(1)(ii) of this section, or the expiration of any subsequent extension.

[55 FR 11159, March 27, 1990; 59 FR 53568, Oct. 25, 1994]

<<PART 220--CREDIT BY BROKERS AND DEALERS (REGULATION T)>>
Authority: 15 U.S.C. 78c, 78g, 78h, 78q, and 78w.
Source: Regulation T, 34 FR 9196, June 11, 1969; 34 FR 9984, June 28, 1969; 59 FR 53567, Oct. 25, 1994, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 220--CREDIT BY BROKERS AND DEALERS (REGULATION T)
INTERPRETATIONS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 220.117 Exception to 90-day rule in special cash account.

(a) The Board of Governors has recently interpreted certain of the provisions of Sec. 220.4(c)(8), with respect to the withdrawal of proceeds of a sale of stock in a 'special cash account' when the stock has been sold out of the account prior to payment for its purchase.

(b) The specific factual situation presented may be summarized as follows:

Customer purchased stock in a special cash account with a member firm on Day 1. On Day 3 customer sold the same stock at a profit. On Day 8 customer delivered his check for the cost of the purchase to the creditor (member firm). On Day 9 the creditor mailed to the customer a check for the proceeds of the sale.

(c) Section 220.4(c)(8) prohibits a creditor, as a general rule, from effecting a purchase of a security in a customer's special cash account if any security has been purchased in that account during the preceding 90 days and has then been sold in the account or delivered out to any broker or dealer without having been previously paid for in full by the customer. One exception to this general rule reads as follows:

* * * The creditor may disregard for the purposes of this subparagraph (s 220.4(c)(8)) a sale without prior payment provided full cash payment is received within the period described by subparagraph (2) of this paragraph (seven days after the date of purchase) and the customer has not withdrawn the proceeds of sale on or before the day on which such payment (and also final payment of any check received in that connection) is received. * * *

(d) Final payment of customer's check:

(1) The first question is: When is the creditor to be regarded as having received 'final payment of any check received' in connection with the purchase?

(2) The **clear** purpose of Sec. 220.4(c)(8) is to prevent the use of the proceeds of sale of a stock by a customer to pay for its purchase--i.e., to prevent him from trading on the creditor's funds by being able to deposit the sale proceeds prior to presentment of his own **check** to the drawee bank. Thus, when a customer undertakes to pay for a purchase by **check,** that **check** does not constitute payment for the purchase, within the language and intent of the above-quoted exception in Sec. 220.4(c)(8), until it has been honored by the drawee bank, indicating the sufficiency of his account to pay the **check.**

---------- Page 59945 follows ----------

(3) The phrase 'final payment of any check' is interpreted as above notwithstanding Sec. 220.6(f), which provides that:

For the purposes of this part (Regulation T), a creditor may, at his option (1) treat the receipt in good faith of any check or draft drawn on a bank which in the ordinary course of business is payable on presentation, * * * as receipt

of payment of the amount of such check, draft or order; * * *

This is a general provision substantially the same as language found in section 4(f) of Regulation T as originally promulgated in 1934. The language of the subject exception to the 90-day rule of Sec. 220.4(c)(8), i.e., the exception based expressly on final 'payment of any check,' was added to the regulation in 1949 by an amendment directed at a specific type of situation. Because the exception is a special, more recent provision, and because Sec. 220.6(f), if controlling, would permit the exception to undermine, to some extent, the effectiveness of the 90-day rule, sound principles of construction require that the phrase 'final payment of any check' be given its literal and intended effect.

(4) There is no fixed period of time from the moment of receipt by the payee, or of deposit, within which it is certain that any check will be paid by the drawee bank. Therefore, in the rare case where the operation of the subject exception to Sec. 220.4(c)(8) is necessary to avoid application of the 90-day rule, a creditor should ascertain (from his bank of deposit or otherwise) the fact of payment of a customer's check given for the purchase. Having so determined the day of final payment, the creditor can permit withdrawal on any subsequent day.

(e) Mailing as 'withdrawal':

(1) Also presented is the question whether the mailing to the customer of the creditor's check for the sale proceeds constitutes a withdrawal of such proceeds by the customer at the time of mailing so that, if the check for the sale proceeds is mailed on or before the day on which the customer's check for the purchase is finally paid, the 90-day rule applies. It may be that a check mailed one day will not ordinarily be received by the customer until the next. The Board is of the view, however, that when the check for sale proceeds is issued and released into the mails, the proceeds are to be regarded as withdrawn by the customer; a more liberal interpretation would open a way for circumvention. Accordingly, the creditor's check should not be mailed nor the sale proceeds otherwise released to the customer 'on or before the day' on which payment for the purchase, including final payment of any check given for such payment, is received by the creditor, as determined in accordance with the principles stated herein.

---------- **Page 59946 follows** ----------

(2) Applying the above principles to the schedule of transactions described in the second paragraph of this interpretation, the mailing of the creditor's check on 'Day 9' would be consistent with the subject exception to Sec. 220.4(c)(8), as interpreted herein, only if the customer's check was paid by the drawee bank on 'Day 8'.

[27 FR 3511, Apr. 12, 1962]

<<PART 220--CREDIT BY BROKERS AND DEALERS (REGULATION T)>>

Authority: 15 U.S.C. 78c, 78g, 78h, 78q, and 78w.

Source: Regulation T, 34 FR 9196, June 11, 1969; 34 FR 9984, June 28, 1969; 59 FR 53567, Oct. 25, 1994, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 225--BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL
(REGULATION Y)
SUBPART H--NOTICE OF ADDITION OR CHANGE OF DIRECTORS AND SENIOR EXECUTIVE OFFICERS
INTERPRETATIONS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 225.129 Activities closely related to banking.

Courier activities. The Board's amendment of Sec. 225.4(a), which adds courier services to the list of closely related activities is intended to permit holding companies to transport time critical materials of limited intrinsic value of the types utilized by banks and bank-related firms in performing their business activities. Such transportation activities are of particular importance in the **check clearing** process of the banking system, but are also important to the performance of other activities, including the processing of financially-related economic data. The authority is not intended to permit holding companies to engage generally in the provision of transportation services.

During the course of the Board's proceedings pertaining to courier services, objections were made that courier activities were not a proper incident to banking because of the possibility that holding companies would or had engaged in unfair competitive practices. The Board believes that adherence to the following principles will eliminate or reduce to an insignificant degree any possibility of unfair competition:

a. A holding company courier subsidiary established under Sec. 4(c)(8) should be a separate, independent corporate entity, not merely a servicing arm of a bank.

b. As such, the subsidiary should exist as a separate, profit-oriented operation and should not be subsidized by the holding company system.

c. Services performed should be explicitly priced, and shall not be paid for indirectly, for example, on the basis of deposits maintained at or loan arrangements with affiliated banks.

Accordingly, entry of holding companies into courier activities on the basis of section 4(c)(8) will be conditioned as follows:

1. The courier subsidiary shall perform services on an explicit fee basis and shall be structured as an individual profit center designed to be operated on a profitable basis. The Board may regard operating losses sustained over an extended period as being inconsistent with continued authority to engage in courier activities.

---------- **Page 60204 follows** ----------

2. Courier services performed on behalf of an affiliate's customer(such as the carriage of incoming cash letters) shall be paid for by the customer. Such payments shall not be made indirectly, for example, on the basis of imputed

earnings on deposits maintained at or of loan arrangements with subsidiaries of the holding company. Concern has also been expressed that bank-affiliated courier services will be utilized to gain a competitive advantage over firms competing with other holding company affiliates. To reduce the possibility that courier affiliates might be so employed, the Board will impose the following third condition:

3. The courier subsidiary shall, when requested by any bank or any data processing firm providing financially-related data processing services which firm competes with a banking or data processing subsidiary of Applicant, furnish comparable service at comparable rates, unless compliance with such request would be beyond the courier subsidiary's practical capacity. In this regard, the courier subsidiary should make known to the public its minimum rate schedule for services and its general pricing policies thereto. The courier subsidiary is also expected to maintain for a reasonable period of time (not less than two years) each request denied with the reasons for such denial.

[Reg. Y, 38 FR 32126, Nov. 21, 1973, as amended at 40 FR 36309, Aug. 20, 1975]

<<PART 225--BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)>>

Authority: 12 U.S.C. 1817(j)(13), 1818, 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(l), 3106, 3108, 3310, 3331-3351, 3907, and 3909.

Source: 49 FR 818, Jan. 5, 1984; 51 FR 36211, Oct. 9, 1986; 55 FR 6790, Feb. 27, 1990; 55 FR 27771, July 5, 1990; 55 FR 47743, Nov. 15, 1990; 57 FR 21207, May 19, 1992; 57 FR 22426, May 28, 1992; 57 FR 43890, Sept. 23, 1992; 57 FR 60720, Dec. 22, 1992; 57 FR 62180, Dec. 30, 1992; 58 FR 4074, Jan. 13, 1993; 58 FR 7980, Feb. 11, 1993; 58 FR 47209, Sept. 8, 1993; 59 FR 22968, May 4, 1994; 59 FR 29500, June 7, 1994; 59 FR 62993, Dec. 7, 1994; 59 FR 63244, Dec. 8, 1994; 59 FR 65474, Dec. 20, 1994, unless otherwise noted.

<<SUBPART H--NOTICE OF ADDITION OR CHANGE OF DIRECTORS AND SENIOR EXECUTIVE OFFICERS>>

Source: 55 FR 6790, Feb. 27, 1990, unless otherwise noted.

---------- **End of Document** ----------

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PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)
SUBPART A--GENERAL

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.1 Authority and purpose; organization.

(a) Authority and purpose. This part (Regulation CC; 12 CFR part 229) is issued by the Board of Governors of the Federal Reserve System (Board) to implement the Expedited Funds Availability Act (Act) (title VI of Pub. L. 100-86, 101 Stat. 552, 635), as amended by section 1001 of the Cranston-Gonzalez National Affordable Housing Act of 1990 (Pub. L. 101-625, 104 Stat. 4079, 4424) and sections 212(h), 225, and 227 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, 105 Stat. 2236, 2303, 2307).

(b) Organization. This part is divided into subparts and appendices as follows--

(1) Subpart A contains general information. It sets forth--

(i) The authority, purpose, and organization;

(ii) Definition of terms; and

(iii) Authority for administrative enforcement of this part's provisions.

(2) Subpart B of this part contains rules regarding the duty of banks to make funds deposited into accounts available for withdrawal, including availability schedules. Subpart B of this part also contains rules regarding exceptions to the schedules, disclosure of funds availability policies, payment of interest, liability of banks for failure to comply with Subpart B of this part, and other matters.

(3) Subpart C of this part contains rules to expedite the collection and return of **checks** by banks. These rules cover the direct return of **checks,** the manner in which the paying bank and returning banks must return **checks** to the depositary bank, notification of nonpayment by the paying bank, **indorsement** and presentment of **checks,** same-day settlement for certain **checks,** the liability of banks for failure to comply with subpart C of this part, and other matters.

[57 FR 36598, Aug. 14, 1992; 57 FR 46972, Oct. 14, 1992; 60 FR 51670, Oct. 3, 1995]

<<PART 229
--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)>>

---------- **Page 60801 follows** ----------

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

---------- **End of Document** ----------

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SUBPART A--GENERAL

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.2 Definitions.

As used in this part, unless the context requires otherwise:

(a) 'Account' means a deposit as defined in 12 CFR 204.2(a)(1)(i) that is a transaction account as described in 12 CFR 204.2(e). As defined in these sections, 'account' generally includes accounts at a bank from which the account holder is permitted to make transfers or withdrawals by negotiable or transferable instrument, payment order of withdrawal, telephone transfer, electronic payment, or other similar means for the purpose of making payments or transfers to third persons or others. 'Account' also includes accounts at a bank from which the account holder may make third party payments at an ATM, remote service unit, or other electronic device, including by debit card, but the term does not include savings deposits or accounts described in 12 CFR 204.2(d)(2) even though such accounts permit third party transfers. An account may be in the form of--

(1) A demand deposit account,
(2) A negotiable order of withdrawal account,
(3) A share draft account,
(4) An automatic transfer account, or
(5) Any other transaction account described in 12 CFR 204.2(e).

'Account' does not include an account where the account holder is a bank, where the account holder is an office of an institution described in paragraphs (e)(1) through (e)(6) of this section or an office of a 'foreign bank' as defined in section 1(b) of the International Banking Act (12 U.S.C. 3101) that is located outside the United States, or where the direct or indirect account holder is the Treasury of the United States.

(b) 'Automated clearinghouse' or 'ACH' means a facility that processes debit and credit transfers under rules established by a Federal Reserve Bank operating circular on automated clearinghouse items or under rules of an automated clearinghouse association.

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(c) 'Automated teller machine' or 'ATM' means an electronic device at which a natural person may make deposits to an account by cash or check and perform other account transactions.

(d) 'Available for withdrawal' with respect to funds deposited means available for all uses generally permitted to the customer for actually and finally collected funds under the bank's account agreement or policies, such as for payment of checks drawn on the account, certification of checks drawn on the account, electronic payments, withdrawals by cash, and transfers between accounts.

(e) 'Bank' means--

(1) An 'insured bank' as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 18I3) or a bank that is eligible to apply to become an insured bank under section 5 of that Act (12 U.S.C. 1815);
(2) A 'mutual savings bank' as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);
(3) A 'savings bank' as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);
(4) An 'insured credit union' as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) or a credit union that is eligible to make application to become an insured credit union under section 201 of that Act (12 U.S.C. 1781);
(5) A 'member' as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422);
(6) A 'savings association' as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) that is an insured depository institution as defined in section 3 of that Act (12 U.S.C. 1813(c)(2)) or that is eligible to apply to become an insured depository institution under section 5 of that Act (12 U.S.C. 1815); or
(7) An 'agency' or a 'branch' of a 'foreign bank' as defined in section 1(b) of the International Banking Act (12 U.S.C. 3101).

For purposes of Subpart C and, in connection therewith, Subpart A, the term 'bank' also includes any person engaged in the business of banking, including a Federal Reserve Bank, a Federal Home Loan Bank, and a state or unit of general local government to the extent that the state or unit of general local government acts as a paying bank. Unless otherwise specified, the term 'bank' includes all of a bank's offices in the United States, but not offices located outside the United States.

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(f) 'Banking day' means that part of any business day on which an office of a bank is open to the public for carrying on substantially all of its banking functions.
(g) 'Business day' means a calendar day other than a Saturday or a Sunday, January 1, the third Monday in January, the third Monday in February, the last Monday in May, July 4, the first Monday in September, the second Monday in October, November 11, the fourth Thursday in November, or December 25. If January 1, July 4, November 11, or December 25 fall on a Sunday, the next Monday is not a business day.
(h) 'Cash' means United States coins and currency.
(i) 'Cashier's check' means a check that is--
(1) Drawn on a bank;
(2) Signed by an officer or employee of the bank on behalf of the bank as drawer;
(3) A direct obligation of the bank; and
(4) Provided to a customer of the bank or acquired from the bank for remittance purposes.
(j) 'Certified check' means a check with respect to which the drawee bank certifies by signature on the check of an officer or other authorized employee of the bank that--
(1)(i) The signature of the drawer on the check is genuine; and
(ii) The bank has set aside funds that--
(A) Are equal to the amount of the check, and
(B) Will be used to pay the check; or
(2) The bank will pay the check upon presentment.
(k) 'Check' means--

(1) A negotiable demand draft drawn on or payable through or at an office of a bank;
(2) A negotiable demand draft drawn on a Federal Reserve Bank or a Federal Home Loan Bank;
(3) A negotiable demand draft drawn on the Treasury of the United States;
(4) A demand draft drawn on a state government or unit of general local government that is not payable through or at a bank;
(5) A United States Postal Service money order; or
(6) A traveler's check drawn on or payable through or at a bank.
The term 'check' does not include a noncash item or an item payable in a medium other than United States money. A draft may be a 'check' even though it is described on its face by another term, such as 'money order.' For purposes of Subpart C, and in connection therewith, Subpart A, of this part, the term 'check' also includes a demand draft of the type described above that is nonnegotiable.
(l) [Reserved]
(m) 'Check processing region' means the geographical area served by an office of a Federal Reserve Bank for purposes of its check processing activities.

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(n) 'Consumer account' means any account used primarily for personal, family, or household purposes.
(o) 'Depositary bank' means the first bank to which a **check** is transferred even though it is also the paying bank or the payee. A **check** deposited in an account is deemed to be transferred to the bank holding the account into which the **check** is deposited, even though the **check** is physically received and **indorsed** first by another bank.
(p) 'Electronic payment' means a wire transfer or an ACH credit transfer.
(q) 'Forward collection' means the process by which a bank sends a check on a cash basis to the paying bank for payment.
(r) 'Local check' means a check payable by or at a local paying bank, or a check payable by a nonbank payor and payable through a local paying bank.
(s) 'Local paying bank' means a paying bank that is located in the same check processing region as the physical location of the branch or proprietary ATM of the depositary bank in which that check was deposited.
(t) 'Merger transaction' means--
(1) A merger or consolidation of two or more banks; or
(2) The transfer of substantially all of the assets of one or more banks or branches to another bank in consideration of the assumption by the acquiring bank of substantially all of the liabilities of the transferring banks, including the deposit liabilities.
(u) 'Noncash item' means an item that would otherwise be a check, except that--
(1) A passbook, certificate, or other document is attached;
(2) It is accompanied by special instructions, such as a request for special advice of payment or dishonor;
(3) It consists of more than a single thickness of paper, except a check that qualifies for handling by automated check processing equipment; or
(4) It has not been preprinted or post-encoded in magnetic ink with the routing number of the paying bank.
(v) 'Nonlocal check' means a check payable by, through, or at a nonlocal paying bank.
(w) 'Nonlocal paying bank' means a paying bank that is not a local paying bank with respect to the depositary bank.
(x) 'Nonproprietary ATM' means an ATM that is not a proprietary ATM.
(y) [Reserved]

(z) 'Paying bank' means--
(1) The bank by which a check is payable, unless the check is payable at another bank and is sent to the other bank for payment or collection;
(2) The bank at which a check is payable and to which it is sent for payment or collection;

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(3) The Federal Reserve Bank or Federal Home Loan Bank by which a check is payable;
(4) The bank through which a check is payable and to which it is sent for payment or collection, if the check is not payable by a bank; or
(5) The state or unit of general local government on which a check is drawn and to which it is sent for payment or collection.

For purposes of Subpart C, and in connection therewith, Subpart A, 'paying bank' includes the bank through which a check is payable and to which the check is sent for payment or collection, regardless of whether the check is payable by another bank, and the bank whose routing number appears on a check in fractional or magnetic form and to which the check is sent for payment or collection.
(aa) 'Proprietary ATM' means an ATM that is--
(1) Owned or operated by, or operated exclusively for, the depositary bank;
(2) Located on the premises (including the outside wall) of the depositary bank; or
(3) Located within 50 feet of the premises of the depositary bank, and not identified as being owned or operated by another entity.
If more than one bank meets the owned or operated criterion of paragraph (aa)(1) of this section, the ATM is considered proprietary to the bank that operates it.
(bb) 'Qualified returned check' means a returned check that is prepared for automated return to the depositary bank by placing the check in a carrier envelope or placing a strip on the check and encoding the strip or envelope in magnetic ink. A qualified returned check need not contain other elements of a check drawn on the depositary bank, such as the name of the depositary bank.
(cc) 'Returning bank' means a bank (other than the paying or depositary bank) handling a returned check or notice in lieu of return. A returning bank is also a collecting bank for purposes of U.C.C. 4-202(b).
(dd) 'Routing number' means--
(1) The number printed on the face of a check in fractional form on in nine-digit form; or
(2) The number in a bank's indorsement in fractional or nine-digit form.
(ee) 'Similarly situated bank' means a bank of similar size, located in the same community, and with similar check handling activities as the paying bank or returning bank.
(ff) 'State' means a state, the District of Columbia, Puerto Rico, or the U.S. Virgin Islands.
(gg) 'Teller's check' means a check provided to a customer of a bank or acquired from a bank for remittance purposes, that is drawn by the bank, and drawn on another bank or payable through or at a bank.

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(hh) 'Traveler's check' means an instrument for the payment of money that--
(1) Is drawn on or payable through or at a bank;
(2) Is designated on its face by the term 'traveler's check' or by any substantially similar term or is commonly known and marketed as a traveler's check by a corporation or bank that is an issuer of traveler's checks;
(3) Provides for a specimen signature of the purchaser to be completed at the

time of purchase; and

(4) Provides for a countersignature of the purchaser to be completed at the time of negotiation.

(ii) 'Uniform Commercial Code,' 'Code,' or 'U.C.C.' means the Uniform Commercial Code as adopted in a state.

(jj) 'United States' means the states, including the District of Columbia, the U.S. Virgin Islands, and Puerto Rico.

(kk) 'Unit of general local government' means any city, county, parish, town, township, village, or other general purpose political subdivision of a state. The term does not include special purpose units of government, such as school districts or water districts.

(ll) Wire transfer means an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary upon receipt or on a day stated in the order, that is transmitted by electronic or other means through Fedwire, the Clearing House Interbank Payments System, other similar network, between banks, or on the books of a bank. Wire transfer does not include an electronic fund transfer as defined in section 903(6) of the Electronic Fund Transfer Act (15 U.S.C. 1693a(6)).

(mm) Fedwire has the same meaning as that set forth in Sec. 210.26(e) of this chapter.

(nn) Good faith means honesty in fact and observance of reasonable commercial standards of fair dealing.

(oo) Interest compensation means an amount of money calculated at the average of the Federal Funds rates published by the Federal Reserve Bank of New York for each of the days for which interest compensation is payable, divided by 360. The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the last preceding day for which there is a published rate.

(pp) Unless the context requires otherwise, the terms not defined in this section have the meanings set forth in the U.C.C.

[53 FR 31292, Aug. 18, 1988; 53 FR 44324, Nov. 2, 1988; 54 FR 13850, April 6, 1989; 57 FR 46972, Oct. 14, 1992; 60 FR 51670, Oct. 3, 1995]

---------- **Page 60808 follows** ----------

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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(REGULATION CC)
SUBPART A--GENERAL

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.3 Administrative enforcement.

(a) Enforcement agencies. Compliance with this part is enforced under--
(1) Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818 et seq.) in the case of--
(i) National banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;
(ii) Member banks of the Federal Reserve System (other than national banks), and offices, branches, and agencies of foreign banks located in the United States (other than Federal branches, Federal agencies, and insured State branches of foreign banks), by the Board; and
(iii) Banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;
(2) Section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision in the case of savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation; and
(3) The Federal Credit Union Act (12 U.S.C. 1751 et seq.) by the National Credit Union Administration Board with respect to any federal credit union or credit union insured by the National Credit Union Share Insurance Fund.

The terms used in paragraph (a)(1) of this section that are not defined in this part or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).
(b) Additional powers.
(1) For the purposes of the exercise by any agency referred to in paragraph (a) of this section of its powers under any statute referred to in that paragraph, a violation of any requirement imposed under the Act is deemed to be a violation of a requirement imposed under that statute.

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(2) In addition to its powers under any provision of law specifically referred to in paragraph (a) of this section, each of the agencies referred to in that paragraph may exercise, for purposes of enforcing compliance with any requirement imposed under this part, any other authority conferred on it by law.
(c) Enforcement by the Board.
(1) Except to the extent that enforcement of the requirements imposed under this part is specifically committed to some other government agency, the Board shall enforce such requirements.
(2) If the Board determines that--

(i) Any bank that is not a bank described in paragraph (a) of this section; or

(ii) Any other person subject to the authority of the Board under the Act and this part,

has failed to comply with any requirement imposed by this part, the Board may issue an order prohibiting any bank, any Federal Reserve Bank, or any other person subject to the authority of the Board from engaging in any activity or transaction that directly or indirectly involves such noncomplying bank or person (including any activity or transaction involving the receipt, payment, collection, and **clearing** of **checks,** and any related function of the payment system with respect to **checks).**

[55 FR 21855, May 30, 1990; 57 FR 36600, Aug. 14, 1992]

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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(REGULATION CC)
SUBPART B--AVAILABILITY OF FUNDS AND DISCLOSURE OF FUNDS
AVAILABILITY POLICIES

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.13 Exceptions.

(a) New accounts. For purposes of this paragraph, checks subject to Sec. 229.10(c)(1)(v) include traveler's checks.

(1) A deposit in a new account--

(i) Is subject to the requirements of Sec. 229.10 (a) and (b) to make funds from deposits by cash and electronic payments available for withdrawal on the business day following the banking day of deposit or receipt;

(ii) Is subject to the requirements of Sec. 229.10(c)(1) (i) through (v) and Sec. 229.10(c)(2) only with respect to the first $5,000 of funds deposited on any one banking day; but the amount of the deposit in excess of $5,000 shall be available for withdrawal not later than the ninth business day following the banking day on which funds are deposited; and

(iii) Is not subject to the availability requirements of ss 229.10(c)(1)(vi) and (vii) and 229.12.

(2) An account is considered a new account during the first 30 calendar days after the account is established. An account is not considered a new account if each customer on the account has had, within 30 calendar days before the account is established, another account at the depositary bank for at least 30 calendar days.

(b) Large deposits. Sections 229.10(c) and 229.12 do not apply to the aggregate amount of deposits by one or more checks to the extent that the aggregate amount is in excess of $5,000 on any one banking. day. For customers that have multiple accounts at a depositary bank, the bank may apply this exception to the aggregate deposits to all accounts held by the customer, even if the customer is not the sole holder of the accounts and not all of the holders of the accounts are the same.

(c) Redeposited checks. Sections 229.10(c) and 229.12 do not apply to a check that has been returned unpaid and redeposited by the customer or the depositary bank. This exception does not apply--

(1) To a **check** that has been returned due to a missing **indorsement** and redeposited after the missing **indorsement** has been obtained, if the reason for return indication on the **check** states that it was returned due to a missing **indorsement**; or

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(2) To a check that has been returned because it was post dated, if the reason for return indicated on the check states that it was returned because it was post dated, and if the check is no longer postdated when redeposited.

(d) Repeated overdrafts. If any account or combination of accounts of a depositary bank's customer has been repeatedly overdrawn, then for a period of

six months after the last such overdraft, ss 229.10(c) and 229.12 do not apply to any of the accounts. A depositary bank may consider a customer's account to be repeatedly overdrawn if--

(1) On six or more banking days within the preceding six months, the account balance is negative, or the account balance would have become negative if checks or other charges to the account had been paid; or

(2) On two or more banking days within the preceding six months, the account balance is negative, or the account balance would have become negative, in the amount of $5,000 or more, if checks or other charges to the account had been paid.

(e) Reasonable cause to doubt collectibility--

(1) In general. Sections 229.10(c) and 229.12 do not apply to a check deposited in an account at a depositary bank if the depositary bank has reasonable cause to believe that the check us uncollectible from the paying bank. Reasonable cause to believe a check is uncollectible requires the existence of facts that would cause a well-grounded belief in the mind of a reasonable person. Such belief shall not be based on the fact that the check is of a particular class or is deposited by a particular class of persons. The reason for the bank's belief that the check is uncollectible shall be included in the notice required under paragraph (g) of this section.

(2) Overdraft and returned check fees. A depositary bank that extends the time when funds will be available for withdrawal as described in paragraph (e)(1) of this section, and does not furnish the depositor with written notice at the time of deposit shall not assess any fees for any subsequent overdrafts (including use of a line of credit) or return of checks of other debits to the account, if--

(i) The overdraft or return of the check would not have occurred except for the fact that the deposited funds were delayed under paragraph (e)(1) of this section; and

(ii) The deposited check was paid by the paying bank.

Notwithstanding the foregoing, the depositary bank may assess an overdraft or returned check fee if it includes a notice concerning overdraft and returned check fees with the notice of exception required in paragraph (g) of this section and, when required, refunds any such fees upon the request of the customer. The notice must state that the customer may be entitled to a refund of overdraft or returned check fees that are assessed if the check subject to the exception is paid and how to obtain a refund.

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(f) Emergency conditions. Sections 229.10(c) and 229.12 do not apply to funds deposited by check in a depositary bank in the case of--

(1) An interruption of communications or computer or other equipment facilities;

(2) A suspension of payments by another bank;

(3) A war; or

(4) An emergency condition beyond the control of the depositary bank,

if the depositary bank exercises such diligence as the circumstances require.

(g) Notice of exception--

(1) In general. Subject to paragraphs (g)(2) and (g)(3) of this section, when a depositary bank extends the time when funds will be available for withdrawal based on the application of an exception contained in paragraphs (b) through (f) of this section, it must provide the depositor with a written notice.

(i) The notice shall include the following information--

(A) The account number of the customer;
(B) The date and amount of the deposit;
(C) The amount of the deposit that is being delayed;
(D) The reason the exception was invoked; and
(E) The time period within which the funds will be available for withdrawal, unless the emergency conditions exception in paragraph (f) of this section has been invoked, and the depositary bank, in good faith, does not know the duration of the emergency and, consequently, when the funds must be made available at the time the notice must be given.
(ii) Timing of notice.
(A) The notice shall be provided to the depositor at the time of the deposit, unless the deposit is not made in person to an employee of the depositary bank, or, if the facts upon which a determination to invoke one of the exceptions in paragraphs (b) through (f) of this section to delay a deposit only become known to the depositary bank after the time of the deposit. If the notice is not given at the time of the deposit, the depositary bank shall mail or deliver the notice to the customer as soon as practicable, but no later than the first business day following the day the facts become known to the depositary bank, or the deposit is made, whichever is later.
(B) If the availability of funds is delayed under the emergency conditions exception provided in paragraph (f) of this section, the depositary bank is not required to provide a notice if the funds subject to the exception become available before the notice must be sent under paragraph (g)(1)(ii)(A) of this section.
(2) One-time exception notice. In lieu of providing notice pursuant to paragraph (g)(1) of this section, a depositary bank that extends the time when the funds deposited in a nonconsumer account will be available for withdrawal based on an exception contained in paragraph (b) or (c) of this section may provide a single notice to the customer that includes the following information--

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(i) The reason(s) the exception may be invoked; and
(ii) The time period within which deposits subject to the exception generally will be available for withdrawal.

This one-time notice shall be provided only if each type of exception cited in the notice will be invoked for most check deposits in the account to which the exception could apply. This notice shall be provided at or prior to the time notice must be provided under paragraph (g)(1)(ii) of this section.
(3) Notice of repeated overdrafts exception. In lieu of providing notice pursuant to paragraph (g)(1) of this section, a depositary bank that extends the time when funds deposited in an account will be available for withdrawal based on the exception contained in paragraph (d) of this section may provide a notice to the customer for each time period during which the exception will be in effect. The notice shall include the following information--
(i) The account number of the customer;
(ii) The fact that the availability of funds deposited in the customer's account will be delayed because the repeated overdrafts exception will be invoked;
(iii) The time period within which deposits subject to the exception generally will be available for withdrawal; and
(iv) The time period during which the exception will apply.

This notice shall be provided at or prior to the time notice must be provided under paragraph (g)(1)(ii) of this section and only if the exception cited in

the notice will be invoked for most check deposits in the account.

(4) Record retention. A depositary bank shall retain a record, in accordance with Sec. 229.21(g), of each notice provided pursuant to its application of the reasonable cause exception under paragraph (e) of this section, together with a brief statement of the facts giving rise to the bank's reason to doubt the collectibility of the check.

(h) Availability of deposits subject to exceptions.

(1) If an exception contained in paragraphs (b) through (f) of this section applies, the depositary bank may extend the time periods established under ss 229.10(c) and 229.12 by a reasonable period of time.

(2) If a depositary bank invokes an exception contained in paragraphs (b) through (e) of this section with respect to a check described in Sec. 229.10(c)(1) (i) through (v) or Sec. 229.10(c)(2), it shall make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to 229.12.

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(3) If a depositary bank invokes an exception under paragraph (f) of this section based on an emergency condition, the depositary bank shall make the funds available for withdrawal not later than a reasonable period after the emergency has ceased or the period established in Sec. 229.12, whichever is later.

(4) For the purposes of paragraphs (h)(1), (h)(2), and (h)(3) of this section, a reasonable period is an extension of up to one business day for checks subject to Sec. 229.10(c)(1)(vi), five business days for checks subject to Sec. 229.12(b) and checks that would be subject to Sec. 229.12(b) under paragraph (h)(2) of this section, and six business days for checks subject to Sec. 229.12(c) and checks that would be subject to Sec. 229.12(c) under paragraph (h)(2) of this section. A longer extension may be reasonable, but the bank has the burden of so establishing.

[54 FR 13850, April 6, 1989; 55 FR 21855, May 30, 1990; 57 FR 3279, Jan. 29, 1992; 57 FR 36598, Aug. 14, 1992; 60 FR 51671, Oct. 3, 1995]

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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(REGULATION CC)
SUBPART C--COLLECTION OF CHECKS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.30 Paying bank's responsibility for return of checks.

(a) Return of checks. If a paying bank determines not to pay a check, it shall return the check in an expeditious manner as provided in either paragraphs (a)(1) or (a)(2) of this section.

(1) Two-day/four-day test. A paying bank returns a check in an expeditious manner if it sends the returned check in a manner such that the check would normally be received by the depositary bank not later than 4:00 p.m. (local time of the depositary bank) of--

(i) The second business day following the banking day on which the check was presented to the paying bank, if the paying bank is located in the same check processing region as the depositary bank; or

(ii) The fourth business day following the banking day on which the check was presented to the paying bank, if the paying bank is not located in the same check processing region as the depositary bank.

If the last business day on which the paying bank may deliver a returned check to the depositary bank is not a banking day for the depositary bank, the paying bank meets the two-day/four-day test if the returned check is received by the depositary bank on or before the depositary bank's next banking day.

(2) Forward collection test. A paying bank also returns a check in an expeditious manner if it sends the returned check in a manner that a similarly situated bank would normally handle a check--

(i) Of similar amount as the returned check;

(ii) Drawn on the depositary bank; and

(iii) Deposited for forward collection in the similarly situated bank by noon on the banking day following the banking day on which the check was presented to the paying bank.

Subject to the requirement for expeditious return, a paying bank may send a returned check to the depositary bank, or to any other bank agreeing to handle the returned check expeditiously under Sec. 229.31(a). A paying bank may convert a check to a qualified returned check. A qualified returned check must be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a '2' in position 44 of the MICR line as a return identifier, in accordance with the American National Standard Specifications for Placement and Location of MICR Printing, X9.13 (Sept. 1983). This paragraph does not affect a paying bank's responsibility to return a check within the deadlines required by the U.C.C., Regulation J (12 CFR Part 210), or Sec. 229.30(c).

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(b) Unidentifiable depositary bank. A paying bank that is unable to identify the depositary bank with respect to a check may send the returned check to any bank that handled the check for forward collection even if that bank does not agree to handle the check expeditiously under Sec. 229.31(a). A paying bank sending a returned check under this paragraph to a bank that handled the check for forward collection must advise the bank to which the check is sent that the paying bank is unable to identify the depositary bank. The expeditious return requirements in Sec. 229.30(a) do not apply to the paying bank's return of a check under this paragraph.

(c) Extension of deadline. The deadline for return or notice of nonpayment under the U.C.C., Regulation J (12 CFR Part 210), or Sec. 229.36(f)(2) of this part is extended:

(1) If a paying bank, in an effort to expedite delivery of a returned check to a bank, uses a means of delivery that would ordinarily result in the returned check being received by the bank to which it is sent on or before the receiving bank's next banking day following the otherwise applicable deadline; this deadline is extended further if a paying bank uses a highly expeditious means of transportation, even if this means of transportation would ordinarily result in delivery after the receiving bank's next banking day; or

(2) If the deadline falls on a Saturday that is a banking day, as defined in the applicable UCC, for the paying bank, and the paying bank uses a means of delivery that would ordinarily result in the returned check being received by the bank to which it is sent prior to the cut-off hour for the next processing cycle, in the case of a returning bank, or on the next banking day, in the case of a depositary bank, after midnight Saturday night.

(d) Identification of returned **check.** A paying bank returning a **check** shall **clearly** indicate on the face of the **check** that it is a returned **check** and the reason for return.

(e) Depositary bank without accounts. The expeditious return requirements of paragraph (a) of this section do not apply to checks deposited in a depositary bank that does not maintain accounts.

(f) Notice in lieu of return. If a **check** is unavailable for return, the paying bank may send in its place a copy of the front and back of the returned **check,** or, if no such copy is available, a written notice of nonpayment containing the information specified in Sec. 229.33(b). The copy or notice shall **clearly** state that it constitutes a notice in lieu of return. A notice in lieu of return is considered a returned **check** subject to the expeditious return requirements of this section and to the other requirements of this subpart.

(g) Reliance on routing number. A paying bank may return a returned **check** based on any routing number designating the depositary bank appearing on the returned **check** in the depositary bank's **indorsement.**

[53 FR 31292, Aug. 18, 1988; 55 FR 21855, May 30, 1990; 57 FR 46972, Oct. 14, 1992]

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<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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SUBPART C--COLLECTION OF CHECKS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.31 Returning bank's responsibility for return of checks.

(a) Return of checks. A returning bank shall return a returned check in an expeditious manner as provided in either paragraphs (a)(1) or (a)(2) of this section.

(1) Two-day/four-day test. A returning bank returns a check in an expeditious manner if it sends the returned check in a manner such that the check would normally be received by the depositary bank not later than 4:00 p.m. (local time) of--

(i) The second business day following the banking day on which the check was presented to the paying bank if the paying bank is located in the same check processing region as the depositary bank; or

(ii) The fourth business day following the banking day on which the check was presented to the paying bank if the paying bank is not located in the same check processing region as the depositary bank.

If the last business day on which the returning bank may deliver a returned check to the depositary bank is not a banking day for the depositary bank, the returning bank meets this requirement if the returned check is received by the depositary bank on or before the depositary bank's next banking day.

(2) Forward collection test. A returning bank also returns a check in an expeditious manner if it sends the returned check in a manner that a similarly situated bank would normally handle a check--

(i) Of similar amount as the returned check;

(ii) Drawn on the depositary bank; and

(iii) Received for forward collection by the similarly situated bank at the time the returning bank received the returned check, except that a returning bank may set a cut-off hour for the receipt of returned checks that is earlier than the similarly situated bank's cut-off hour for checks received for forward collection, if the cut-off hour is not earlier than 2:00 p.m.

Subject to the requirement for expeditious return, the returning bank may send the returned check to the depositary bank, or to any bank agreeing to handle the returned check expeditiously under Sec. 229.31(a). The returning bank may convert the returned check to a qualified returned check. A qualified returned check must be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a '2' in position 44 of the MICR line as a return identifier, in accordance with the American National Standard Specification for Placement and Location of MICR Printing, X9.13 (Sept. 1983). The time for expeditious return under the forward collection test, and the deadline for return under the U.C.C. and Regulation J (12 CFR part 210), are

extended by one business day if the returning bank converts a returned check to a qualified returned check. This extension does not apply to the two-day/four-day test specified in paragraph (a)(1) of this section or when a returning bank is returning a check directly to the depositary bank.

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(b) Unidentifiable depositary bank. A returning bank that is unable to identify the depositary bank with respect to a returned check may send the returned check to--

(1) Any collecting bank that handled the check for forward collection if the returning bank was not a collecting bank with respect to the returned check; or

(2) A prior collecting bank, if the returning bank was a collecting bank with respect to the returned check;

even if that collecting bank does not agree to handle the returned check expeditiously under Sec. 229.31(a). A returning bank sending a returned check under this paragraph must advise the bank to which the check is sent that the returning bank is unable to identify the depositary bank. The expeditious return requirements in paragraph (a) of this section do not apply to return of a check under this paragraph. A returning bank that receives a returned check from a paying bank under Sec. 229.30(b), or from a returning bank under this paragraph, but that is able to identify the depositary bank, must thereafter return the check expeditiously to the depositary bank.

(c) Settlement. A returning bank shall settle with a bank sending a returned check to it for return by the same means that it settles or would settle with the sending bank for a check received for forward collection drawn on the depositary bank. This settlement is final when made.

(d) Charges. A returning bank may impose a charge on a bank sending a returned check for handling the returned check.

(e) Depositary bank without accounts. The expeditious return requirements of paragraph (a) of this section do not apply to checks deposited with a depositary bank that does not maintain accounts.

(f) Notice in lieu of return. If a **check** is unavailable for return, the returning bank may send in its place a copy of the front and back of the returned **check,** or, if no copy is available, a written notice of nonpayment containing the information specified in Sec. 229.33(b). The copy or notice shall **clearly** state that it constitutes a notice in lieu of return. A notice in lieu of return is considered a returned **check** subject to the expeditious return requirements of this section and to the other requirements of this subpart.

(g) Reliance on routing number. A returning bank may return a returned **check** based on any routing number designating the depositary bank appearing on the returned **check** in the depositary bank's **indorsement** or in magnetic ink on a qualified returned **check.**

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[53 FR 31292, Aug. 18, 1988; 54 FR 13850, April 6, 1989]

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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SUBPART C--COLLECTION OF CHECKS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.32 Depositary bank's responsibility for returned checks.

(a) Acceptance of returned checks. A depositary bank shall accept returned checks and written notices of nonpayment

(1) At a location at which presentment of checks for forward collection is requested by the depositary bank; and

(2)(i) At a branch, head office, or other location consistent with the name and address of the bank in its **indorsement** on the **check**;

(ii) If no address appears in the **indorsement,** at a branch or head office associated with the routing number of the bank in its **indorsement** on the **check**;

(iii) If the address in the **indorsement** is not in the same **check** processing region as the address associated with the routing number of the bank in its **indorsement** on the **check,** at a location consistent with the address in the **indorsement** and at a branch or head office associated with the routing number in the bank's **indorsement**; or * * *

(iv) If no routing number or address appears in its **indorsement** on the **check,** at any branch or head office of the bank.

A depositary bank may require that returned checks be separated from forward collection checks.

(b) Payment. A depositary bank shall pay the returning or paying bank returning the check to it for the amount of the check prior to the close of business on the banking day on which it received the check ('payment date') by--

(1) Debit to an account of the depositary bank on the books of the returning or paying bank;

(2) Cash;

(3) Wire transfer; or

(4) Any other form of payment acceptable to the returning or paying bank;

provided that the proceeds of the payment are available to the returning or paying bank in cash or by credit to an account of the returning or paying bank on or as of the payment date. If the payment date is not a banking day for the returning or paying bank or the depositary bank is unable to make the payment on the payment date, payment shall be made by the next day that is a banking day for the returning or paying bank. These payments are final when made.

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(c) Misrouted returned checks and written notices of nonpayment. If a bank receives a returned check or written notice of nonpayment on the basis that it is the depositary bank, and the bank determines that it is not the depositary bank with respect to the check or notice, it shall either promptly send the

returned check or notice to the depositary bank directly or by means of a returning bank agreeing to handle the returned check expeditiously under Sec. 229.31(a), or send the check or notice back to the bank from which it was received.

(d) Charges. A depositary bank may not impose a charge for accepting and paying checks being returned to it.

[54 FR 13850, April 6, 1989]

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.33 Notice of nonpayment.

(a) Requirement. If a paying bank determines not to pay a check in the amount of $2,500 or more, it shall provide notice of nonpayment such that the notice is received by the depositary bank by 4:00 p.m. (local time) on the second business day following the banking day on which the check was presented to the paying bank. If the day the paying bank is required to provide notice is not a banking day for the depositary bank, receipt of notice on the depositary bank's next banking day constitutes timely notice. Notice may be provided by any reasonable means, including the returned check, a writing (including a copy of the check), telephone, Fedwire, telex, or other form of telegraph.

(b) Content of notice. Notice must include the--

(1) Name and routing number of the paying bank;
(2) Name of the payee(s);
(3) Amount;
(4) Date of the indorsement of the depositary bank;
(5) Account number of the customer(s) of the depositary bank;
(6) Branch name or number of the depositary bank from its indorsement;
(7) Trace number associated with the indorsement of the depositary bank; and
(8) Reason for nonpayment.

The notice may include other information from the **check** that may be useful in identifying the **check** being returned and the customer, and, in the case of a written notice, must include the name and routing number of the depositary bank from its **indorsement.** If the paying bank is not sure of an item of information, it shall include the information required by this paragraph to the extent possible, and identify any item of information for which the bank is not sure of the accuracy with question marks.

(c) Acceptance of notice. The depositary bank shall accept notices during its banking day--

(1) Either at the telephone or telegraph number of its return **check** unit indicated in the **indorsement,** or, if no such number appears in the **indorsement** or if the number is illegible, at the general purpose telephone or telegraph number of its head office or the branch indicated in the **indorsement**; and

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(2) At any other number held out by the bank for receipt of notice of nonpayment, and, in the case of written notice, as specified in Sec. 229.32(a).

(d) Notification to customer. If the depositary bank receives a returned check or notice of nonpayment, it shall send notice to its customer of the facts by midnight of the banking day following the banking day on which it received the returned check or notice, or within a longer reasonable time.

(e) Depositary bank without accounts. The requirements of this section do not apply to checks deposited in a depositary bank that does not maintain accounts.

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.35 Indorsements.

(a) **Indorsement** standards. A bank (other than a paying bank) that handles a **check** during forward collection or a returned **check** shall legibly **indorse** the **check** in accordance with the **indorsement** standard set forth in appendix D to this part.

(b) Liability of bank handling **check.** A bank that handles a **check** for forward collection or return is liable to any bank that subsequently handles the **check** to the extent that the subsequent bank does not receive payment for the **check** because of suspension of payments by another bank or otherwise. This paragraph applies whether or not a bank has placed its **indorsement** on the **check.** This liability is not affected by the failure of any bank to exercise ordinary care, but any bank failing to do so remains liable. A bank seeking recovery against a prior bank shall send notice to that prior bank reasonably promptly after it learns the facts entitling it to recover. A bank may recover from the bank with which it settled for the **check** by revoking the settlement, charging back any credit given to an account, or obtaining a refund. A bank may have the rights of a holder with respect to each **check** it handles.

(c) **Indorsement** by a bank. After a **check** has been **indorsed** by a bank, only a bank may acquire the rights of a holder--

(1) Until the check has been returned to the person initiating collection; or

(2) Until the **check** has been specially **indorsed** by a bank to a person who is not a bank.

(d) **Indorsement** for depositary bank. A depositary bank may arrange with another bank to apply the other bank's **indorsement** as the depositary bank **indorsement,** provided that any **indorsement** of the depositary bank on the **check** avoids the area reserved for the depositary bank **indorsement** as specified in Appendix D. The other bank **indorsing** as depositary bank is considered the depositary bank for purposes of Subpart C of this part.

[55 FR 21855, May 30, 1990]

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<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
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TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS
(REGULATION CC)
SUBPART C--COLLECTION OF CHECKS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 229.38 Liability.

(a) Standard of care; liability; measure of damages. A bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart. A bank that fails to exercise ordinary care or act in good faith under this subpart may be liable to the depositary bank, the depositary bank's customer, the owner of a check, or another party to the check. The measure of damages for failure to exercise ordinary care is the amount of the loss incurred, up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care. A bank that fails to act in good faith under this subpart may be liable for other damages, if any, suffered by the party as a proximate consequence. Subject to a bank's duty to exercise ordinary care or act in good faith in choosing the means of return or notice of nonpayment, the bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, or for loss or destruction of a check or notice of nonpayment in transit or in the possession of others. This section does not affect a paying bank's liability to its customer under the U.C.C. or other law.

(b) Paying bank's failure to make timely return. If a paying bank fails both to comply with Sec. 229.30(a) and to comply with the deadline for return under the U.C.C., Regulation J (12 CFR Part 210), or Sec. 229.30(c) in connection with a single nonpayment of a check, the paying bank shall be liable under either Sec. 229.30(a) or such other provision, but not both.

(c) Comparative negligence. If a person, including a bank, fails to exercise ordinary care or act in good faith under this subpart in **indorsing** a **check** (s 229.35), accepting a returned **check** or notice of nonpayment (ss 229.32(a) and 229.33(c)), or otherwise, the damages incurred by that person under Sec. 229.38(a) shall be diminished in proportion to the amount of negligence or bad faith attributable to that person.

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(d) Responsibility for certain aspects of checks--

(1) A paying bank, or in the case of a **check** payable through the paying bank and payable by another bank, the bank by which to **check** is payable, is responsible for damages under paragraph (a) of this section to the extent that the condition of the **check** when issued by it or its customer adversely affects the ability of a bank to **indorse** the **check** legibly in accordance with Sec. 229.35. A depositary bank is responsible for damages under paragraph (a) of this section to the extent that the condition of the back of a **check** arising after the issuance of the **check** and prior to acceptance of the **check** by it adversely affects the ability of a bank to **indorse** the **check** legibly in accordance with Sec. 229.35. Responsibility under this paragraph shall be

treated as negligence of the paying or depositary bank for purposes of paragraph (c) of this section.

(2) Responsibility for payable through checks. In the case of a check that is payable by a bank and payable through a paying bank located in a different check processing region than the bank by which the check is payable, the bank by which the check is payable is responsible for damages under paragraph (a) of this section, to the extent that the check is not returned to the depositary bank through the payable through bank as quickly as the check would have been required to be returned under Sec. 229.30(a) had the bank by which the check is payable--

(i) Received the check as paying bank on the day the payable through bank received the check; and

(ii) Returned the check as paying bank in accordance with Sec. 229.30(a)(1).

Responsibility under this paragraph shall be treated as negligence of the bank by which the check is payable for purposes of paragraph (c) of this section.

(e) Timeliness of action. If a bank is delayed in acting beyond the time limits set forth in this subpart because of interruption of communication or computer facilities, suspension of payments by a bank, war, emergency conditions, failure of equipment, or other circumstances beyond its control, its time for acting is extended for the time necessary to complete the action, if it exercises such diligence as the circumstances require.

(f) Exclusion. Section 229.21 of this part and Sec. 611 (a), (b), and (c) of the Act (12 U.S.C. 4010 (a), (b), and (c)) do not apply to this subpart.

(g) Jurisdiction. Any action under this subpart may be brought in any United States district court, or in any other court of competent jurisdiction, and shall be brought within one year after the date of the occurrence of the violation involved.

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(h) Reliance on Board rulings. No provision of this subpart imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, regardless of whether the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act or omission has occurred.

[54 FR 13850, April 6, 1989; 54 FR 32047, Aug. 4, 1989]

<<PART 229--AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)>>

Authority: 12 U.S.C. 4001 et seq.

Source: 53 FR 19433, May 27, 1988; 57 FR 36598, 36600, Aug. 14, 1992, unless otherwise noted.

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days but within one and one-half years after the date of deposit. Any such account not subject to this minimum early withdrawal penalty will be regarded as a nonpersonal time deposit with an original maturity or notice period of from seven days to less than one and one-half years from the date of the deposit.9

9 A time deposit, or a portion thereof, may be paid before maturity without imposing the early withdrawal penalties specified by this part:

(a) Where the time deposit is maintained in an individual retirement account established in accordance with 26 U.S.C. 408 and is paid within seven days after establishment of the individual retirement account pursuant to 26 CFR 1.408-6(d)(4), where it is maintained in a Keogh (H.R. 10) plan, or where it is maintained in a '401(k) plan' under 26 U.S.C. 401(k); provided that the depositor forfeits an amount at least equal to the simple interest earned on the amount withdrawn;

(b) Where the depository institution pays all or a portion of a time deposit representing funds contributed to an individual retirement account or a Keogh (H.R. 10) plan established pursuant to 26 U.S.C. 408 or 26 U.S.C. 401 or to a '401(k) plan' established pursuant to 26 U.S.C. 401(k) when the individual for whose benefit the account is maintained attains age 59 1/2 or is disabled (as defined in 26 U.S.C. 72(m)(7)) or thereafter;

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(c) Where the depository institution pays that portion of a time deposit on which federal deposit insurance has been lost as a result of the merger of two or more federally insured banks in which the depositor previously maintained separate time deposits, for a period of one year from the date of the merger;

(d) Upon the death of any owner of the time deposit funds;

(e) When any owner of the time deposit is determined to be legally incompetent by a court or other administrative body of competent jurisdiction; or

(f) Where a time deposit is withdrawn within ten days after a specified maturity date even though the deposit contract provided for automatic renewal at the maturity date.

For treatment of accounts existing on March 31, 1986 and for exceptions to the imposition of the early withdrawal penalties imposed by this Part. The penalty required by this Sec. 204.2(f)(3) and that required by Sec. 204.2(c)(1) need not be aggregated.

(g) 'Natural person' means an individual or a sole proprietorship. The term does not mean a corporation owned by an individual, a partnership or other association.

(h) 'Eurocurrency liabilities' means:

(1) For a depository institution or an Edge or Agreement Corporation organized under the laws of the United States, the sum, if positive, of the following:

(i) Net balances due to its non-United States offices and its international

banking facilities ('IBFs') from its United States offices;

(ii)(A) For a depository institution organized under the laws of the United States, assets (including participations) acquired from its United States offices and held by its non-United States offices, by its IBF, or by non-United States offices of an affiliated Edge or Agreement Corporation;10 or

10 This paragraph does not apply to assets (1) that were acquired before October 7, 1979, or (2) that were acquired by an IBF from its establishing entity before the end of the second reserve computation period after its establishment.

(B) For an Edge or Agreement Corporation, assets (including participations) acquired from its United States offices and held by its non-United States offices, by its IBF, by non-United States offices of its U.S or foreign parent institution, or by non-United States offices of an affiliated Edge or Agreement Corporation; and

(iii) Credit outstanding from its non-United States offices to United States residents (other than assets acquired and net balances due from its United States offices), except credit extended (A) from its non-United States offices in the aggregate amount of $100,000 or less to any United States resident, (B) by a non-United States office that at no time during the computation period had credit outstanding, to United States residents exceeding $1 million, (C) to an international banking facility, or (D) to an institution that will be maintaining reserves on such credit pursuant to this part. Credit extended from non-United States offices or from IBFs to a foreign branch, office, subsidiary, affiliate of other foreign establishment ('foreign affiliate') controlled by one or more domestic corporations is not regarded as credit extended to a United States resident if the proceeds will be used to finance the operations outside the United States of the borrower or of other foreign affiliates of the controlling domestic corporation(s).

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(2) For a United States branch or agency of a foreign bank, the sum, if positive, of the following:

(i) Net balances due to its foreign bank (including offices thereof located outside the United States) and its international banking facility after deducting an amount equal to 8 per cent of the following: the United States branch's or agency's total assets less the sum of (A) cash items in process of collection; (B) unposted debits; (C) demand balances due from depository institutions organized under the laws of the United States and from other foreign banks; (D) balances due from foreign central banks; and (E) positive net balances due from its IBF, its foreign bank, and the foreign bank's United States and non-United States offices; and

(ii) Assets (including participations) acquired from the United States branch or agency (other than assets required to be sold by Federal or State supervisory authorities) and held by its foreign bank (including offices thereof located outside the United States), by its parent holding company, by non-United States offices or an IBF of an affiliated Edge or Agreement Corporation, or by its IBFs.11

11 This paragraph does not apply to assets (1) that were acquired before October 7, 1979, or (2) that were acquired by an IBF from its establishing entity before the end of the second reserve computation period after its establishment.

(i)(1) 'Cash item in process of collection' means:
(i) Checks in the process of collection, drawn on a bank or other depository institution that are payable immediately upon presentation in the United States, including checks forwarded to a Federal Reserve Bank in process of collection and checks on hand that will be presented for payment or forwarded for collection on the following business day;
(ii) Government checks drawn on the Treasury of the United States that are in the process of collection; and
(iii) Such other items in the process of collection, that are payable immediately upon presentation in the United States and that are customarily cleared or collected by depository institutions as cash items, including:
(A) Drafts payable through another depository institution;
(B) matured bonds and coupons (including bonds and coupons that have been called and are payable on presentation);
(C) Food coupons and certificates;
(D) Postal and other money orders, and traveler's checks;
(E) Amounts credited to deposit accounts in connection with automated payment arrangements where such credits are made one business day prior to the scheduled payment date to insure that funds are available on the payment date;

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(F) Commodity or bill of lading drafts payable immediately upon presentation in the United States;
(G) Returned items and unposted debits; and
(H) Broker security drafts.
(2) 'Cash item in process of collection' does not include items handled as noncash collections and credit card sales slips and drafts.
(j) 'Net transaction accounts' means the total amount of a depository institution's transaction accounts less the deductions allowed under the provisions of Sec. 204.3.
(k)(1) 'Vault cash' means United States currency and coin owned and held by a depository institution that may, at any time, be used to satisfy depositors' claims.
(2) 'Vault cash' includes United States currency and coin in transit to a Federal Reserve Bank or a correspondent depository institution for which the reporting depository institution has not yet received credit, and United States currency and coin in transit from a Federal Reserve Bank or a correspondent depository institution when the reporting depository institution's account at the Federal Reserve or correspondent bank has been charged for such shipment.
(3) Silver and gold coin and other currency and coin whose numismatic or bullion value is substantially in excess of face value is not vault cash for purposes of this part.
(l) 'Pass through account' means a balance maintained by a depository institution that is not a member bank, by a U.S. branch or agency of a foreign bank, or by an Edge or Agreement Corporation, (1) in an institution that maintains required reserve balances at a Federal Reserve Bank, (2) in a Federal Home Loan Bank, (3) in the National Credit Union Administration Central Liquidity Facility, or (4) in an institution that has been authorized by the Board to pass through required reserve balances if the institution, Federal Home Loan Bank, or National Credit Union Administration Central Liquidity Facility maintains the funds in the form of a balance in a Federal Reserve Bank of which it is a member or at which it maintains an account in accordance with rules and regulations of the Board.
(m)(1) 'Depository institution' means:
(i) Any insured bank as defined in section 3 of the Federal Deposit Insurance

Act (12 U.S.C. 1813(h)) or any bank that is eligible to apply to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(ii) Any savings bank or mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(f), (g));

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(iii) Any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752(7)) or any credit union that is eligible to apply to become an insured credit union under section 201 of such Act (12 U.S.C. 1781);

(iv) Any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422(4)); and

(v) Any insured institution as defined in section 401 of the National Housing Act (12 U.S.C. 1724(a)) or any institution which is eligible to apply to become an insured institution under section 403 of such Act (12 U.S.C. 1726).

(2) 'Depository institution' does not include international organizations such as the World Bank, the Inter-American Development Bank, and the Asian Development Bank.

(n) 'Member bank' means a depository institution that is a member of the Federal Reserve System.

(o) 'Foreign bank' means any bank or other similar institution organized under the laws of any country other than the United States or organized under the laws of Puerto Rico, Guam, American Samoa, the Virgin Islands, or other territory or possession of the United States.

(p) 'De novo depository institution' means a depository institution that was not engaged in business on July 1, 1979, and is not the successor by merger or consolidation to a depository institution that was engaged in business prior to the date of merger or consolidation.

(q) 'Affiliate' includes any corporation, association, or other organization:

(1) Of which a depository institution, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 percent of the numbers of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions;

(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a depository institution who own or control either a majority of the shares of such depository institution or more than 50 percent of the number of shares voted for the election of directors of such depository institution at the preceding election, or by trustees for the benefit of the shareholders of any such depository institution;

(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one depository institution; or

(4) Which owns or controls, directly or indirectly, either a majority of the shares of capital stock of a depository institution or more than 50 percent of the number of shares voted for the election of directors, trustees or other persons exercising similar functions of a depository institution at the preceding election, or controls in any manner the election of a majority of the directors, trustees, or other persons exercising similar functions of a depository institution, or for the benefit of whose shareholders or members all or substantially all the capital stock of a depository institution is held by trustees.

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(r) 'United States' means the States of the United States and the District of

Columbia.

(s) 'United States resident' means (1) any individual residing (at the time of the transaction) in the United States; (2) any corporation, partnership, association or other entity organized in the United States ('domestic corporation'); and (3) any branch or office located in the United States of any entity that is not organized in the United States.

(t) 'Any deposit that is payable only at an office located outside the United States' means (1) a deposit of a United States resident12 that is in a denomination of $100,000 or more, and as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States or (2) a deposit of a person who is not a United States resident12 as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States.

12 A deposit of a foreign branch, office, subsidiary, affiliate or other foreign establishment ('foreign affiliate') controlled by one or more domestic corporations is not regarded as a deposit of a United States resident if the funds serve a purpose in connection with its foreign or international business or that of other foreign affiliates of the controlling domestic corporation(s).

(u) Teller's check means a check drawn by a depository institution on another depository institution, a Federal Reserve Bank, or a Federal Home Loan Bank, or payable at or through a depository institution, a Federal Reserve Bank, or a Federal Home Loan Bank, and which the drawing depository institution engages or is obliged to pay upon dishonor.

(Authority: Secs. 19, 25, 25(a) of the Federal Reserve Act (12 U.S.C. 461, 601 et seq., 611, et seq.); sec. 7 of the Int'l Banking Act of 1978 (12 U.S.C. 3105); sec. 327 of the Garn-St. Germain Depository Instns. Act of 1982 (12 U.S.C. 3503) 95 Stat. 1501)

[45 FR 56018, Aug. 22, 1980, as amended at 45 FR 81537, Dec. 11, 1980; 46 FR 22178, Apr. 16, 1981; 46 FR 27092, May 18, 1981; 46 FR 32428, 32429, June 23, 1981; 47 FR 38105, Aug. 30, 1982; 47 FR 44707, Oct. 12 1982; 47 FR 55208, Dec. 8, 1982; 48 FR 224, Jan. 4, 1983; 48 FR 28973, June 24, 1983; 48 FR 46263, Oct. 12, 1983; 51 FR 9632, 9635, March 20, 1986; 55 FR 50541, Dec. 7, 1990; 56 FR 15494, April 17, 1991; 57 FR 38427, Aug. 25, 1992; 57 FR 40598, Sept. 4, 1992]

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<<PART 204--RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)>>

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.
Source: 45 FR 56018, Aug. 22, 1980; 51 FR 43176, Dec. 1, 1986; 52 FR 2215, Jan. 21, 1987; 52 FR 46451, Dec. 8, 1987; 57 FR 56443, Nov. 30, 1992; 58 FR 61802, Nov. 23, 1993, unless otherwise noted.

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CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 210--COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS AND FUNDS TRANSFERS THROUGH FEDWIRE (REGULATION J)
SUBPART A--COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 210.12 Return of cash items and handling of returned checks.

(a) Return of cash items. A paying bank that receives a cash item directly or indirectly from a Reserve Bank, other than for immediate payment over the counter, and that pays for the item as provided in Sec. 210.9(a) of this subpart, may, before it has finally paid the item, return the item in accordance with Subpart C of Part 229, the Uniform Commercial Code, and its Reserve Bank's operating circular. A paying bank that receives a cash item directly or indirectly from a Reserve Bank also may return the item prior to settlement, in accordance with Sec. 210.9(a) and its Reserve Bank's operating circular. The rules or practices of a clearinghouse through which the item was presented, or a special collection agreement under which the item was presented, may not extend these return times, but may provide for a shorter return time.

(b) Return of checks not handled by Reserve Banks. A paying bank that receives a check as defined in 12 CFR 229.2(k), other than directly or indirectly from a Reserve Bank, and that determines not to pay the check, may send the returned check to its Reserve Bank in accordance with Subpart C of Part 229, the Uniform Commercial Code, and its Reserve Bank's operating Circular. A returning bank may send a returned check to its Reserve Bank in accordance with Subpart C of Part 229, the Uniform Commercial Code, and its Reserve Bank's operating circular.

(c) Paying bank's and returning bank's agreement. The warranties, authorizations, and agreements made pursuant to this paragraph may not be disclaimed and are made whether or not the returned **check** bears an **indorsement** of the paying bank or returning bank. By sending a returned **check** to a Reserve Bank, the paying bank or returning bank--

(1) Authorizes the receiving Reserve Bank (and any other Reserve Bank or returning bank to which the returned check is sent) to handle the returned check subject to this subpart and to the Reserve Banks' operating circulars;

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(2) Makes the warranties set forth in Sec. 229.34 of this title (but this paragraph does not limit any warranty by a paying or returning bank arising under state law); and

(3) Agrees to indemnify each Reserve Bank for any loss or expense (including attorneys' fees and expenses of litigation) resulting from--

(i) The paying or returning bank's lack of authority to give the authorization in paragraph (c)(1) of this section;

(ii) Any action taken by a Reserve Bank within the scope of its authority in

handling the returned check; or

(iii) Any warranty made by the Reserve Bank under 12 CFR 229.34.

(d) Warranties by Reserve Bank. By sending a returned check and receiving settlement or other consideration for it, a Reserve Bank makes the returning bank warranties as set forth in Sec. 229.34 of this title, subject to the terms of part 229 of this title. The Reserve Bank shall not have or assume any other liability to the transferee returning bank, to any subsequent returning bank, to the depository bank, to the owner of the check, or to any other person, except for the Reserve Bank's own lack of good faith or failure to exercise ordinary care as provided in subpart C of part 229 of this title.

(e) Recovery by Reserve Bank. If an action or proceeding is brought against (or if defense is tendered to) a Reserve Bank that has handled a returned Check based on--

(1) The alleged failure of the paying or returning bank to have the authority to give the authorization in paragraph (c)(1) of this section;

(2) Any action by the Reserve Bank within the scope of its authority in handling the returned check; or

(3) Any warranty made by the Reserve Bank under 12 CFR 229.34,

The Reserve Bank may, upon the entry of a final judgment or decree, recover from the paying bank or returning bank the amount of attorneys' fees and other expenses of litigation incurred, as well as any amount the Reserve Bank is required to pay because of the judgment or decree or the tender of defense, together with interest thereon.

(f) Methods of recovery. The Reserve Bank may recover the amount stated in paragraph (d) of this section by charging any account on its books that is maintained or used by the paying or returning bank (or, if the returning bank is another Reserve Bank, by entering a charge against the other Reserve Bank through the Interdistrict Settlement Fund), if--

(1) The Reserve Bank made seasonable written demand on the paying or returning bank to assume defense of the action or proceeding; and

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(2) The paying or returning bank has not made any other arrangement for payment that is acceptable to the Reserve Bank.

The Reserve Bank is not responsible for defending the action or proceeding before using this method of recovery. A Reserve Bank that has been charged through the Interdistrict Settlement Fund may recover from the paying or returning bank in the manner and under the circumstances set forth in this paragraph. A Reserve Bank's failure to avail itself of the remedy provided in this paragraph does not prejudice its enforcement in any other manner of the indemnity agreement referred to in paragraph (c)(3) of this section.

(g) Reserve Bank's responsibility. A Reserve Bank shall handle a returned check, or a notice of nonpayment, in accordance with Subpart C of Part 229 and its operating circular. A Reserve Bank may permit or require the paying or returning bank to send direct to another Reserve Bank a returned check with respect to which the depositary bank is located within the other Reserve Bank's District, in accordance with Sec. 210.4(b).

(h) Settlement. A subsequent returning bank or depositary bank shall settle for returned checks in the same manner and by the same time as for cash items presented for payment under this subpart.

(i) Security interest. To secure any obligation due or to become due to a Reserve Bank by a paying bank, returning bank, or prior returning bank under this subpart or subpart C of part 229 of this title, the paying bank, returning

bank, and prior returning bank, by sending a returned check directly or indirectly to the Reserve Bank, grant to the Reserve Bank a security interest in all of the paying bank's, returning bank's, and prior returning bank's assets in the possession of, or held for the account of, the Reserve Bank. The security interest attaches when a warranty is breached or any other obligation to the Reserve Bank is incurred. If the Reserve Bank, in its sole discretion, deems itself insecure and gives notice thereof to the paying bank, returning bank, or prior returning bank, or if the paying bank, returning bank, or prior returning bank suspends payments or is closed, the Reserve Bank may take any action authorized by law to recover the amount of an obligation, including, but not limited to, the exercise of rights of set off, the realization on any available collateral, and any other rights it may have as a creditor under applicable law.

[50 FR 5740, Feb. 12, 1985; 50 FR 41336, Oct. 10, 1985; 51 FR 21745, June 16, 1986; 53 FR 21985, June 13, 1988; 59 FR 22966, May 4, 1994]

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<<PART 210--COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS AND FUNDS TRANSFERS THROUGH FEDWIRE (REGULATION J)>>

Authority: 12 U.S.C. 248 (i), (j), and (o), 342, 360, 464, and 4001-4010.
Source: 45 FR 68634, Oct. 16, 1980; 53 FR 21984, June 13, 1988; 55 FR 40801, Oct. 5, 1990; 55 FR 47428, Nov. 13, 1990; 59 FR 22965, May 4, 1994, unless otherwise noted.

<<SUBPART A--COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS>>

Source: 53 FR 21984, June 13, 1988, unless otherwise noted.

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TITLE 12--BANKS AND BANKING
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SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 220--CREDIT BY BROKERS AND DEALERS (REGULATION T)

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 220.8 Cash account.

(a) Permissible transactions. In a cash account, a creditor, may:

(1) Buy for or sell to any customer any security if: (i) There are sufficient funds in the accounts; or (ii) the creditor accepts in good faith the customer's agreement that the customer will promptly make full cash payment for the security before selling it and does not contemplate selling it prior to making such payment;

(2) Buy from or sell for any customer any security if: (i) The security is held in the account; or (ii) the creditor accepts in good faith the customer's statement that the security is owned by the customer or the customer's principal, and that it will be promptly deposited in the account;

(3) Issue, endorse, or guarantee an option for any customer if:

(i) In the case of a call option, the underlying security (or a security immediately convertible into the underlying security, without the payment of money) is held in or purchased for the account on the same day, and the option premium is held in the account until cash payment for the underlying or convertible security is received; or

(ii) In the case of a put option, the creditor obtains cash in an amount equal to the exercise price or holds in the account any of the following instruments with a current market value at least equal to the exercise price and with one year or less to maturity: securities issued or guaranteed by the United States or its agencies, negotiable bank certificates of deposit, or bankers acceptances issued by banking institutions in the United States and payable in the United States.

(4) Use an escrow agreement in lieu of the cash or underlying security position if:

(i) In the case of a call or a put, the creditor is advised by the customer that the required securities or cash are held by a bank and the creditor independently verifies that an appropriate escrow agreement will be delivered by the bank promptly; or

(ii) In the case of a call issued, endorsed, or guaranteed on the same day the underlying security is purchased in the account and the underlying security is to be delivered to a bank, the creditor verifies that an appropriate escrow agreement will be delivered by the bank promptly.

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(b) Time periods for payment; cancellation or liquidation.

(1) Full cash payment. A creditor shall obtain full cash payment for customer purchases--

(i) Within one payment period of the date:

(A) Any nonexempted security was purchased;

(B) Any unissued security was made available by the issuer for delivery to purchasers;